IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-156

THE VENDO COMPANY, a Missouri corporation,
Petitioner,

vs.

LEKTRO-VEND CORP., a Delaware corporation,
HARRY B. STONER and **STONER INVESTMENTS, INC.**,
a Delaware corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EARL E. POLLOCK
GARY SENNER
PHILIP A. HABER
LOUIS C. KEILER
SONNENSCHEIN CARLIN NATH
& ROSENTHAL
8000 Sears Tower
Chicago, Illinois 60606
Attorneys for Petitioner

LAMBERT M. OCHSENSCHLAGER
WAYNE F. WEILER
REID, OCHSENSCHLAGER, MURPHY & HUPP
75 S. Stolp Ave.
Aurora, Illinois 60507
Of Counsel

CHAS. P. YOUNG-CHICAGO

INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

THE VENDO COMPANY, a Missouri corporation,
Petitioner,

vs.

LEKTRO-VEND CORP., a Delaware corporation,
HARRY B. STONER and STONER INVESTMENTS, INC.,
a Delaware corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this action on May 28, 1976, affirming an order of the District Court granting a preliminary injunction in favor of respondents.

Opinions Below

The opinion of the Court of Appeals is unofficially reported at 1976-1 Trade Cases ¶ 60,919 and is reproduced in Appendix A. The Memorandum Opinion and Order of the District Court is reported at 403 F. Supp. 527 and is reproduced in Appendix D.

Jurisdiction

The final judgment of the Court of Appeals was entered on May 28, 1976. The Court of Appeals denied petitioner's

petition for rehearing on July 16, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

In a previously filed state court proceeding, the Illinois Supreme Court affirmed judgments to compensate petitioner Vendo for respondent Stoner's violation of his state-law fiduciary duties while serving as a Vendo director and officer, and this Court denied certiorari. Before the judgments could be collected, however, Stoner obtained from the Federal District Court a preliminary injunction against enforcement of the judgments on the basis of Stoner's claim that the state proceeding and the judgments violated the federal antitrust laws. The questions presented are:

(1) Whether § 16 of the Clayton Act "expressly authorizes" injunctions against state court proceedings as an exception to the Anti-Injunction Statute, 28 U.S.C. § 2283.

(2) Whether principles of comity and federalism normally applicable to requested injunctions against state court proceedings do not apply where the injunction is sought under § 16 of the Clayton Act.

(3) Whether a single federal district judge has jurisdiction to review and nullify a final decision of the highest court of a state.

(4) Whether state court defendants who have deliberately withdrawn their federal antitrust defense (and thereby have prevented its consideration by the state courts) may on the same federal antitrust ground subsequently obtain a federal preliminary injunction against collection of final judgments entered in the state proceeding.

Statutes Involved

The Federal Anti-Injunction Act, 28 U.S.C. § 2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

STATEMENT OF THE CASE

Introduction

This is a federal antitrust action brought in the Northern District of Illinois under §§ 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26). In their complaint the respondents (plaintiffs below) allege, *inter alia,* that petitioner Vendo violated the Sherman Act by bringing and prosecuting an action in the Illinois state courts against two of the

respondents, Harry B. Stoner and Stoner Investments, Inc., resulting in judgments against them totalling $7,516,335.

These judgments against respondents Stoner and Stoner Investments were affirmed by the Illinois Supreme Court in *The Vendo Co.* v *Stoner,* 58 Ill. 2d 289, 321 N.E. 2d 1 (1974), holding that Stoner, while both an officer and director of Vendo, had repeatedly violated his state-law fiduciary duties to Vendo. This Court denied certiorari, 420 U.S. 975 (1975).

Nevertheless, to forestall collection of the judgments, the respondents then obtained from the District Court in this case an order which preliminarily enjoined Vendo from taking "any further steps to enforce or collect, or attempt to enforce or collect" the judgments (App. 40).* The Court of Appeals affirmed on May 28, 1976 (App. 1, 17) and denied Vendo's petition for rehearing on July 16, 1976 (App. 18).

Vendo's state court suit was filed *eleven years ago* in August, 1965. This federal action was filed two months later by respondents Stoner and Stoner Investments, the defendants in the state court suit, and Lektro-Vend Corp., a company (like Stoner Investments) controlled by Stoner and members of his family.

Stoner was the president and the controlling owner of Stoner Manufacturing Corporation (now Stoner Investments), which had been engaged for many years in the business of making and selling candy-vending machines throughout the United States. In April, 1959, Vendo and Stoner Manufacturing entered into a contract for Vendo's

---

* "App." references are to the pertinent pages in the Appendices to this Petition, *infra.*

purchase of the assets of Stoner Manufacturing.* Stoner also executed an employment contract with Vendo (providing for a salary of $50,000 a year), and Stoner became a director of Vendo as well as president of the company's Aurora Division (formerly the Stoner Manufacturing plant). Stoner ceased being a Vendo director in March or April of 1964, and Stoner's contract of employment terminated June 1, 1964. (58 Ill. 2d at 293, 295, 300-01, 321 N.E. 2d at 4, 7-8.)

The State Court Proceeding

In the marathon state court proceeding (lasting approximately nine-and-one-half years), it was determined that Stoner, individually and through Stoner Investments, had violated his fiduciary duties to Vendo *during the 1959-64 period that he was an officer and director of Vendo* (a) by secretly supporting the development and marketing of a new type of candy vending machine by Lektro-Vend, (b) by withholding the facts concerning his involvement with Lektro-Vend and misleading Vendo with regard to its possible acquisition of the Lektro-Vend machine, and (c) by misappropriating Vendo's opportunity to acquire the machine.

It was also determined that Stoner and Stoner Investments had unlawfully breached the non-competition covenants in their agreements with Vendo, but that in any event the judgments were proper on the basis of Stoner's violation of his fiduciary duties "[q]uite apart from any liability which may be predicated upon a breach of the covenants

---

* Under the sale contract Vendo agreed to pay Stoner Manufacturing (1) $3,400,000 in cash; (2) 60,000 shares of Vendo stock; (3) for a period of 10 years (or until such time as Vendo might exercise an option to purchase the Stoner plant) all profits in excess of $250,000 realized from the use of the assets being purchased; and (4) for a period of 10 years, 25% of the income received from foreign sales realized from the use of assets being purchased.

against competition. . ." and "[r]egardless of the . . . disposition of those restraint-of-trade issues. . ." (58 Ill. 2d at 303-04, 308, 321 N.E. 2d at 9, 12.)

In December, 1966, the state trial court sitting without a jury found in favor of Vendo and initially entered a judgment against the two defendants jointly for $1,100,000 and a judgment against Stoner individually for $250,000.

The defendants appealed to the Illinois Appellate Court, which in 1969 sustained the trial court's conclusion concerning Stoner's misconduct* but remanded the case to the trial court for a further hearing with respect to the amount of damages recoverable by Vendo. (105 Ill. App. 2d 261, 245 N.E. 2d 263.)

The Illinois Appellate Court sustained the validity of the non-competition covenants in the sale and employment contracts. It found that the defendants' breaches of the covenants occurred "in-term," i.e., during the period specified by the contract in which Stoner was to be paid to perform services for Vendo and in which Stoner Investments was to be paid a percentage of Vendo's profits derived from the assets it had sold to Vendo. (105 Ill. App. 2d at 281-86, 245 N.E. 2d at 273-76.)

On the other hand, the Illinois Appellate Court held that the trial court had erred in striking the defendants' federal antitrust defense and that they were entitled on remand to a hearing on the issue. (105 Ill. App. 2d at 294-97, 245 N.E. 2d at 279-81.) However, just before the second trial was to commence, Stoner and Stoner Investments *formally withdrew their federal antitrust defense which the Illinois Appellate Court had at their behest sustained and had directed the trial Court to consider.* (App. 7.)

---

* In addition to Stoner's violation of his fiduciary duties as an officer and director, Stoner had also been held liable by the trial court on the ground of theft of trade secrets belonging to Vendo, but this alternative ground was reversed by the Illinois Appellate Court and the issue was not pursued thereafter.

At the second trial, in 1971, on the basis of additional evidence on damages, the trial court awarded a judgment to Vendo in the amount of $170,835 against Stoner and a judgment against both defendants for $7,345,000. The defendants again appealed to the Illinois Appellate Court, which in 1973 affirmed the judgment against Stoner but reversed the judgment against the two defendants jointly and remanded the case for a further hearing. (13 Ill. App. 3d 291, 300 N.E. 2d 632.) Each side filed a petition for leave to appeal to the Illinois Supreme Court, and both petitions were allowed.

In its opinion, written by Mr. Justice Schaefer, the Illinois Supreme Court unanimously affirmed both trial court judgments, holding:

> *"Quite apart from any liability which may be predicated upon a breach of the covenants against competition contained in the sales agreement and the employment contract,* it is clear that Stoner violated his fiduciary duties to plaintiff during the period when he was a director and an officer of plaintiff. . . .
>
> *"Stoner had a foot in each camp.* Not only did his undisclosed individual interest in controlling the further development and ultimately the manufacture and sale of the Lektro-Vend create the possibility of his taking an unfair advantage of plaintiff, but the evidence gives strong indication that he actually misled plaintiff while he was purportedly acting as plaintiff's agent with regard to plaintiff's possible acquisition of the Lektro-Vend." (58 Ill. 2d at 303-04, 321 N.E. 2d at 9; italics added.)

With respect to the non-competition covenants, the Illinois Supreme Court held:

> "The appellate court concluded, in our opinion correctly, that defendants' activities directed toward the development and thereafter the marketing of the

Lektro-Vend, consisting of substantial financial aid, and the provision of physical facilities, as well as defendant's ownership interest in the Lektro-Vend enterprise, were so substantial as to go beyond the limits established by the covenants.

"Regardless of the appellate court's disposition of those restraint-of-trade issues, the defendants may, as we have pointed out, be held liable on the ground of a breach of fiduciary obligation on the part of Stoner. . . .

"At the original trial defendants raised as an affirmative defense and by way of counterclaim a charge that the sale agreement and the employment contract violated both the Illinois Antitrust Act (Ill. Rev. Stat. 1973, ch. 38, par. 60-1 *et seq.*) and *the Federal antitrust laws* (15 U.S.C. sec. 1 *et seq.*). *The latter charge was withdrawn by defendants on the remand,* and references in the record indicate that at some point a suit was filed against plaintiff in the United States District Court for the Northern District of Illinois relating to the alleged violations of Federal law.

"With respect to the State antitrust claim . . . the Illinois act, having been enacted in 1965, long after the contracts here in question were entered into, cannot properly form the basis of a counterclaim by defendants." (58 Ill. 2d at 308-10, 321 N.E. 2d at 11-12; italics added.)

On November 27, 1974, the Illinois Supreme Court denied a petition for rehearing filed by Stoner and Stoner Investments. On December 9, 1974, Mr. Justice Schaefer of the Illinois Supreme Court denied their request for a stay of execution pending consideration of their petition for certiorari in this Court. On January 28, 1975, Mr. Justice Rehnquist also denied a request by Stoner and Stoner Investments for a stay of execution pending consideration of their petition for certiorari. On March 17, 1975, this Court denied the petition for certiorari. (420 U.S. 975.)

The Federal Action and the Decision Below

On January 2, 1975, after Vendo had commenced efforts to collect its state court judgments, respondents reactivated this federal suit, filing an amended complaint reasserting their antitrust claim with respect to the state action. Thereafter, on January 29, 1975, respondents filed a motion for a preliminary injunction against the proceedings in the state courts to collect Vendo's judgments.

On May 29, 1975, the District Court issued its Memorandum Opinion and Order, announcing its decision to grant the preliminary injunction (App. 19).* Thereafter, on June 30, 1975, the District Court's Order Granting Preliminary Injunction was entered (App. 36). Vendo appealed to the Court of Appeals, which on May 28, 1976, affirmed the District Court's order (App. 1, 17).

In its opinion, the Court of Appeals held that the Federal Anti-Injunction Statute, 28 U.S.C. § 2283, did not bar the injunction. The Court held, on the ground that § 16 of the Clayton Act lodges equitable jurisdiction only in federal courts, that § 16 is one of those federal statutes under which stays of state court proceedings are "expressly authorized" within the scope of that exception to § 2283. (App. 11, 13.)

---

* The District Court, it should be noted, neither held nor found that enforcement of the judgments would violate the antitrust laws. Instead, the Court merely stated that "There is persuasive evidence that Vendo's activities in its litigation against the Stoner interests in Illinois state court were not a genuine attempt to use the adjudicative process legitimately" (App. 30), *citing only events in the 1963-66* period. The District Court also stated that, "*If* the state court litigation was itself part of the anticompetitive scheme, a judgment arising from such litigation is not an ordinary debt" (App. 31, italics added), and "*If* federal law is violated by continuation of the state action the paramount national interest requires court intervention" (App. 34, italics added), but reached no conclusion as to the correctness of the "if" clauses of these hypothetical statements.

The Court of Appeals also rejected Vendo's argument that, entirely apart from the absolute prohibition of § 2283, principles of comity and federalism barred the District Court's injunction against enforcement of the decision of the highest court of a state. The Court of Appeals sweepingly held: "The principle of comity has no applicability when the exclusive remedy for an injury lies in the federal court" (App. 14).

In addition, the Court of Appeals expressly sanctioned the District's Court's assertion of its jurisdiction to review a final decision of the Illinois Supreme Court. The Court stated (App. 14) that "We agree" with the District Court that such a review was "imperative" because the Illinois Supreme Court had not considered the respondents' federal antitrust defense—notwithstanding the fact (acknowledged in a footnote by the Court below, App. 7) that it was the respondents themselves who had prevented the state courts from considering their federal antitrust defense by formally withdrawing the defense several years earlier and never again raising the issue in the state proceeding.

REASONS FOR GRANTING THE WRIT

The decision below, in disregard of fundamental policies governing the relationship between federal and state courts, conflicts in principle with decisions of this Court and conflicts directly with the decisions of other Courts of Appeals.

As set forth more fully in the Statement (*supra*, pp. 5-8), the Illinois Supreme Court, after nearly ten arduous years of litigation, affirmed judgments to compensate Vendo for Stoner's flagrant violations of his state-law fiduciary duties while serving as a Vendo director and officer. This Court denied certiorari, and the state judgments were unequivocally final and entitled to full faith and credit. But then, in order to forestall collection of the judgments against them, Stoner and Stoner Investments hit upon a new strategem. They obtained from the District Court a preliminary injunction against enforcement of the judgments on the claim that the state suit from its very inception was violative of the federal antitrust laws—the same claim, moreover, which they had deliberately withdrawn as a defense in the state proceeding (and thereby prevented the state courts and this Court from adjudicating).

The ramifications of this procedure—approved by the Court below—are, to say the least, extraordinary. It would give to every district judge the power to review, set aside, and nullify final state court judgments through the preliminary injunction device. It would reduce the highest tribunals of any state to the status of special masters subject to *de novo* control by a single district judge. Nor is there any reason why such control should be exercised only under the federal antitrust laws; on precisely the same theory, final state court judgments—even, as here, after the denial of certiorari—could likewise be preliminarily enjoined under myriad other federal statutes as well.

As we shall show, the decision below sanctioning such a procedure is fundamentally at war with settled law regarding the Anti-Injunction Statute, principles of comity and federalism, and collateral review of state court judgments.

I. In Holding that § 16 of the Clayton Act "Expressly Authorizes" Injunctions against State Court Proceedings for Purposes of 28 U.S.C. § 2283, the Decision Below Is in Direct Conflict with Decisions of Other Courts of Appeals and Conflicts in Principle with the Decisions of This Court.

The Anti-Injunction Statute, 28 U.S.C. § 2283 (*supra*, pp. 2-3), categorically prohibits all federal court injunctions against state court proceedings "except as expressly authorized by Act of Congress," or unless one of the other two exceptions stated in § 2283 applies. *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286-87 (1970); *Mitchum* v. *Foster*, 407 U.S. 225, 228-29 (1972).

Furthermore, this Court has repeatedly held that the exceptions to § 2283 are to be strictly and narrowly construed. Thus, in *Amalgamated Clothing Workers of America* v. *Richman Bros.*, 348 U.S. 511 (1955), the Court stated, in referring to the enactment in 1948 of § 2283 in its present form, that ". . . Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation" (p. 514) and that *"This is not a statute conveying a broad general policy for appropriate ad hoc application"* (pp. 515-16, italics added). Similarly, in the *Atlantic Coast Line* case, *supra*, the Court admonished that *"the exceptions should not be enlarged by loose statutory construction."* (398 U.S. at 287, italics added; see also p. 297.)

In accordance with that principle, and as pointed out by this Court in *Mitchum* v. *Foster*, *supra*, 407 U.S. at 234-37, only a small number of federal statutes have been held to "expressly authorize" federal injunctions against state court proceedings. And more specifically, prior to the District Court's decision in this case, no court had ever held that § 16 of the Clayton Act (*supra*, p. 3) was such a statute. On the contrary, every court which had expressly considered the issue had uniformly held that § 16 does *not* "authorize" injunctions against state court proceedings.*

---

* See *Lyons* v. *Westinghouse Electric Corp.*, 201 F.2d 510 (2d Cir.), *cert. denied*, 345 U.S. 923 (1953), affirming 109 F. Supp. 925, 926 (S.D.N.Y. 1952); *Potter* v. *Carvel Stores of N.Y., Inc.*, 314 F.2d 45 (4th Cir. 1963), affirming 203 F. Supp. 462 (D. Md. 1962); *Reines Distributors, Inc.* v. *Admiral Corp.*, 182 F. Supp. 226 (S.D.N.Y. 1960); *Bascom Launder Corp.* v. *Telecoin Corp.*, 9 F.R.D. 677 (S.D.N.Y. 1950); *Avon Pub. Co.* v. *American News Co.*, 143 F. Supp. 516 (S.D.N.Y. 1956); *American Manufacturers Mutual Ins. Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 1966 Trade Cases ¶ 71,918 (S.D.N.Y.). See also the recent decision in *Carter* v. *Ogden Corp.*, 524 F.2d 74, 75 (5th Cir. 1975), reversing an injunction issued under § 16 of the Clayton Act and holding "that under 28 U.S.C.A. § 2283 this injunction was prohibited. . . ." On the other hand, compare *Sar Industries, Inc.* v. *Monogram Industries, Inc.*, 1976-1 Trade Cases ¶ 60,816 (C.D. Cal.), relying on the District Court's decision in this case.

Thus, the Court below not only is the first Court of Appeals ever to hold that § 16 of the Clayton Act "expressly authorizes" injunctions against state proceedings, but furthermore its holding is inconsistent with the holdings of other Courts of Appeals as well as the rationale of this Court's decisions.

A. The Decision Below Is in Direct Conflict with Decisions of Other Courts of Appeals as to the Applicability of § 2283.

Prior to the decision below, the only Courts of Appeals which had decided the issue—the Second and Fourth Circuits—had held that § 16 of the Clayton Act does not "expressly authorize" injunctions against state proceedings. The decision below is in direct conflict with both of those decisions.

Lyons v. *Westinghouse Electric Corp.*, 201 F.2d 510 (2d Cir.), *cert. denied*, 345 U.S. 923 (1953), involved circumstances remarkably similar to those present in the instant case. Westinghouse had sued Lyons and others in the New York state courts for breach of a contract and an accounting. The state court defendants raised a federal antitrust defense in the state suit, claiming that the contract violated the antitrust laws. Thereafter, they brought suit in the federal court against Westinghouse under the federal antitrust laws advancing the same federal antitrust grounds which they had asserted by way of defense in the state proceeding. The District Court held that it could not enjoin the state proceedings, "even though the [federal] Anti-Trust Laws are involved in both actions, as in this case," because *"a stay of these State court proceedings is not expressly authorized by any act of Congress,* and it is not required in aid of this court's jurisdiction or to effectuate its judgments." 109 F. Supp. 925-26 (S.D.N.Y. 1952) (italics added). The Court of Appeals for the Second Circuit affirmed, specifically holding that the District Court

"rightly held that 28 U.S.C.A. § 2283 prevents the issuance of such a stay." 201 F.2d at 510 (italics added).*

Potter v. *Carvel Stores of New York, Inc.*, 314 F.2d 45 (4th Cir. 1963), likewise involved companion state and federal lawsuits in which the state court defendant was the plaintiff in a federal antitrust action brought against the state court plaintiff. The District Court refused to enjoin the state action on the ground that it was barred by § 2283, specifically agreeing that "§16 of the Clayton Act, 15 U.S.C.A. § 26, which provides for private antitrust injunctive relief is not one of the 'Act of Congress' exceptions engrafted into the flat prohibition of 28 U.S.C.A. § 2283." 203 F. Supp. 462, 465 (D. Md. 1962). The Court of Appeals for the Fourth Circuit affirmed, holding that ". . . for the reasons stated by [the District Court], we think that the

* Neither the Clayton Act nor any antitrust issues were even involved in the Second Circuit case cited below (App. 12-13), *Studebaker Corp.* v. *Gittlin*, 360 F.2d 692, 698 (1966). The passing reference to the Clayton Act in *Studebaker*, by way of dictum, did not conclude that § 16 "expressly authorizes" injunctions against state court proceedings, did not cite any case where such a conclusion had been reached, and did not even remotely overrule the Second Circuit's prior decision in *Lyons, supra.*

Equally inapposite are the other two cases cited by the Court below concerning § 2283 (App. 11-12). *Helfenbein* v. *International Industries, Inc.*, 438 F.2d 1068, 1071 (8th Cir. 1971), neither held nor implied that § 16 "expressly authorizes" injunctions against state court proceedings. *Helfenbein* merely decided that, since the plaintiff's injury had not resulted from an antitrust violation, no injunction of any sort was authorized by § 16. The Court did not even reach the question whether, if a proper showing of causation had been made, the injunction would nevertheless have been barred by § 2283. *United States* v. *Bayer Company*, 135 F. Supp. 65 (S.D.N.Y. 1955), was based on a different exception to § 2283—the "effectuate its judgments" exception—and does not even refer to the "expressly authorized" exception.

refusal to enjoin the state court proceedings is unassailable on appeal." 314 F.2d at 46.

See also the recent decision in *Carter* v. *Ogden Corp.*, 524 F.2d 74 (5th Cir. 1975), reversing an injunction issued under § 16 of the Clayton Act and holding "that under 28 U.S.C.A. § 2283 this injunction was prohibited. . . ."

Review of the decision below is essential to resolve the clear conflict between the Circuits.

B. The Decision Below Conflicts in Principle with This Court's Decisions Construing the "Expressly Authorized" Exception to § 2283.

As previously stated (*supra*, pp. 11-12), this Court has repeatedly held that § 2283 and the exceptions thereto are to be strictly and narrowly construed. In *Mitchum* v. *Foster*, 407 U.S. 225 (1972), this Court dealt specifically with the "expressly authorized" exception.

The Court (pp. 234-35) reviewed the seven federal statutes which it had previously held fall within that exception and pointed out (pp. 236-37) that "the criteria to be applied are those reflected in the Court's decisions prior to Toucey" (*Toucey* v. *N. Y. Life Ins. Co.*, 314 U.S. 118 (1941)). In applying those criteria to the statute involved there—§ 1983 of the Civil Rights Act—and after carefully analyzing the origins and history of that statute, the Court in *Mitchum* found that:

> "The very purpose of § 1983 was *to interpose the federal courts between the States and the people*, as guardians of the people's federal rights—to protect the people from unconstitutional action *under color of state law*, 'whether that action be executive, legislative, *or judicial*'." (407 U.S. at 242, italics added.)

On these grounds, this Court determined that § 1983 qualified as an eighth federal statute that "expressly authorized" stays of state court proceedings.

In this case, in holding that § 16 of the Clayton Act is also a federal statute which "expressly authorizes" stays of state court proceedings, the Court below misapplied the criteria recognized in *Mitchum* and violated the strictures contained in this Court's other decisions interpreting § 2283. The decision below represents, in fact, a broad departure from the whole line of this Court's cases concerning § 2283 and sets forth an approach which, if generally accepted, would have serious consequences for the relationship between the federal and state courts, not only in the antitrust field but in many other areas of the law as well.

Without even attempting to analyze the origins and history of § 16, in the way this Court analyzed § 1983 in *Mitchum*, the Court below held that § 16 created a "uniquely federal remedy" merely on the ground that its grant of injunctive powers to enforce the antitrust laws was conferred only on the federal courts (App. 11, 13). According to the Court below (*ibid.*), this jurisdiction "would be frustrated" if Vendo were allowed to enforce its state court judgments. However, it is well established that a grant of exclusive jurisdiction is *not* a ground for holding that the "expressly authorized" exception applies. *Amalgamated Clothing Workers of America* v. *Richman Bros.*, 348 U.S. 511, 515 (1955). In that case, this Court specifically held that § 2283 may bar an injunction even where federal substantive law preempts state law altogether and a state court has acted "wholly without jurisdiction over the subject matter, having invaded a field preempted by Congress." Accord, e.g., *T. Smith & Son, Inc.*, v. *Williams*, 275 F.2d 397 (5th Cir. 1960); *Vernitron Corp.* v. *Benjamin*, 440 F.2d 105, 108 (2d Cir.), *cert. denied*, 402 U.S. 987 (1971).

Even more important, the impropriety of holding that § 16 "expressly authorizes" stays of state proceedings is

demonstrated by comparing §16 with the seven statutes reviewed in *Mitchum* (407 U.S. at 234-35) and with §1983 of the Civil Rights Act. Each of these statutes provides for a special set of uniform federal procedures or remedies. But in addition each of these statutes either contains specific language providing for stays of state proceedings or, in the absence of such language, necessarily requires *by its very nature and function* that conflicting state judicial proceedings must be enjoined in order to achieve its purpose.*

Section 16 of the Clayton Act is clearly not a statute of this type. Even apart from the absence of specific language providing for stays of state proceedings, there is not the slightest basis (and the Court of Appeals pointed to none) for believing that § 16—unlike, e.g., § 1983 of the

---

* The seven statutes enumerated by the Supreme Court are as follows: (1) the provisions in the Bankruptcy Act expressly providing for stays of suits against the bankrupt; (2) 28 U.S.C. § 1446(e), providing that upon the filing of a petition to remove a state suit to federal court the "State court shall proceed no further unless and until the case is remanded"; (3) 46 U.S.C. § 185, providing that upon filing of a shipowner's petition in federal court for limitation of his liability and deposit of the requisite funds by the shipowner with the court, "all claims and proceedings against the owner with respect to the matter in question shall cease"; (4) 28 U.S.C. § 2361, providing that in federal interpleader actions "a district court may . . . enter its order restraining [all claimants] . . . from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument, or obligation involved in the interpleader action"; (5) 11 U.S.C. § 203(s)(2), the provision of the Frazier-Lemke Farm Mortgage Act expressly staying "all judicial or official proceedings in any court"; (6) 28 U.S.C. § 2251, providing that a federal court before which a habeas corpus proceeding is pending may "stay any proceeding against the person detained in any State Court . . . for any matter involved in the habeas corpus proceeding"; (7) § 205(a) of the Emergency Price Control Act of 1942, governing the powers of the Price Administrator to enforce the provisions of the Act.

Civil Rights Act—was designed to prevent abuses by state courts or other governmental bodies. There likewise is not the slightest basis (and the Court of Appeals pointed to none) for believing that Congress' purpose in enacting the statute was even remotely to place injunctive restraints on state court proceedings.

Furthermore, it simply is not true that federal courts have exclusive jurisdiction to enforce the federal antitrust laws. While the Clayton Act confers only federal jurisdiction of *original claims for relief* brought under the federal antitrust laws, it is well-settled that the state courts have jurisdiction to adjudicate federal antitrust *defenses* to state law claims. See, e.g., *Lyons* v. *Westinghouse Electric Corp.*, 222 F.2d 184, 187 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955); IA Moore, Federal Practice ¶0.208 (2d ed. 1974), p. 2325.

Indeed, in the context of this case, it is especially clear that Stoner's federal antitrust remedy against Vendo's prosecution of its state court action was by no means "uniquely federal." As the Illinois Appellate Court had specifically held in that proceeding, Stoner was entitled to assert the federal antitrust issues in state court as a defense to Vendo's claims. But then Stoner chose to withdraw that defense at the opening of the second state court trial. If that defense to Vendo's claims was valid, it could and should have been asserted in the state court proceedings, and Stoner could thereby have "nipped in the bud" any alleged "injury" from the state action.

Of course, as the Court below pointed out, the federal antitrust laws express an important public policy. But the same is true of numerous other federal statutes as well as the Anti-Injunction Statute itself. See, e.g., *Oklahoma Packing Co.* v. *Oklahoma Gas and Electric Co.*, 309 U.S. 4, 8-9 (1939). Clearly the importance of the antitrust laws is not a proper criterion for determining whether the "expressly authorized" exception to § 2283 is applicable.

II. In Holding that Principles of Comity and Federalism Are Inapplicable, the Decision Below Also Directly Conflicts with the Decisions of Another Court of Appeals and in Principle with Decisions of This Court.

In *Younger* v. *Harris*, 401 U.S. 37, 43-45 (1971), and in *Mitchum* v. *Foster*, *supra*, 407 U.S. at 243, this Court reaffirmed the principles of comity and federalism "that must restrain a federal court when asked to enjoin a state court proceeding," even in a case where such an injunction is not absolutely barred by § 2283. See also *Rizzo* v. *Goode*, 423 U.S. 362, 379-80 (1976); *Cousins* v. *Wigoda*, 409 U.S. 1201, 1205-06 (1972). Thus, such principles apply even where an injunction is sought under a federal statute that "expressly authorizes" injunctions against state court proceedings. In *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975), this Court specifically held that principles of comity and federalism barred an injunction against a civil state court proceeding in the context of a suit brought under § 1983 of the Civil Rights Act—the very statute which *Mitchum* held was designed to afford protection against unconstitutional acts by (*inter alia*) state courts.

In this case, however, the Court below held that these principles of comity and federalism were inapplicable for the same reason underlying its decision as to § 2283—namely, that § 16 of the Clayton Act confers equitable jurisdiction only on federal courts. According to the Court below (App. 14): "The principle of comity has no applicability when the exclusive remedy for an injury lies in the federal court." Even apart from the fact that Stoner had a complete remedy in the state courts but deliberately chose to abandon that remedy, the ruling below is not only irreconcilable with the cited decisions of this Court, but furthermore is in direct conflict with decisions of the Court of Appeals for the Fifth Circuit.

In both *Response of Carolina* v. *Leasco Response, Inc.*, 498 F.2d 314 (5th Cir.), *cert. denied*, 419 U.S. 1050 (1974),

and *Red Rock Cola Co.* v. *Red Rock Bottlers,* 195 F.2d 406 (5th Cir. 1952), federal injunctions against state court proceedings were (as in this case) sought under § 16 of the Clayton Act. In both cases, the requested injunctions had been granted by the district courts. But in both cases the Fifth Circuit reversed, holding that—even apart from § 2283—the injunctions were improper on the basis of principles of comity and federalism.

In *Response of Carolina, supra,* 498 F.2d at 320, the Fifth Circuit held:

> "... the principles of comity and federalism recognized by this Court in *Red Rock Cola Co.* v. *Red Rock Bottlers, supra,* 195 F.2d 406 ... mitigate against unnecessarily interfering with pending state court proceedings. *Red Rock* involved a question similar to the issue in this case, whether an injunction could issue under the antitrust laws to enjoin a state court suit. This Court reversed the issuance of the preliminary injunctions on the grounds of federalism and comity."

Similarly, in the *Red Rock* case, *supra,* 195 F.2d at 410, the Fifth Circuit held, quoting *Alabama Public Service Commission* v. *Southern Railway Co.,* 341 U.S. 341, 350 (1951):

> "Considering that 'few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case."

In addition, contrary to the apparent premise of the Court below in brushing aside principles of comity and federalism, a federal injunction against the enforcement of the state court judgments was never Stoner's "exclusive remedy" under the federal antitrust laws. Instead, as the Illinois Appellate Court had held, the respondents were

entitled to assert their federal antitrust defense as a bar to Vendo's claim in the state court. But, for their own tactical reasons, they deliberately chose to abandon that remedy which, if their defense was meritorious, would have prevented the very "injury" of which they now complain.*

No greater insult to the processes of a state judicial system can be conceived than that which has occurred here: Having deliberately abandoned the assertion of their federal antitrust defense in the state courts (which had provided them with "an opportunity for full and fair litigation" of that defense—see *Stone* v. *Powell,* 44 U.S.L.W. 5313, 5321 (U.S., July 6, 1976); *Francis* v. *Henderson,* 48 L.Ed. 2d 149, 154 (1976)), and having elected to proceed to final judgment in the state courts on that basis, the Stoner group then attacked the result of that process by asserting in federal court, as justification for an injunction against the state judgments, the same issues that they had withdrawn from the state courts' consideration. Thus, far from being inapplicable, principles of comity and fed-

---

* Furthermore, § 16 of the Clayton Act authorizes injunctions only against "threatened loss or damage *by a violation of the antitrust laws.*" (Italics added.) If the alleged "injury" results from a separate obligation or is based on independent grounds, no injunction may issue under § 16. See *Response of Carolina* v. *Leasco Response, Inc.,* 498 F.2d 314, 317 (5th Cir.), *cert. denied,* 419 U.S. 1050 (1974); *Helfenbein* v. *International Industries, Inc.,* 438 F.2d 1068, 1071 (8th Cir. 1971); *Mullis* v. *Arco Petroleum Corp.,* 502 F.2d 290, 293 (7th Cir. 1974) (per Stevens, J.).

Here, the Illinois Supreme Court squarely held that the state court judgments are based on Stoner's violation of his fiduciary duties under state law and that the liability of Stoner and Stoner Investments was independent of the non-competition covenants (*supra,* pp. 7-8). Consequently, even assuming *arguendo* that Vendo could be found to have violated the antitrust laws, this would provide no basis for enjoining collection of the Illinois judgments or for relieving Stoner of his Illinois fiduciary obligations. See, e.g., *Singer* v. *A. Hollander & Son, Inc.,* 202 F.2d 55, 59 (3d Cir. 1953); cf. *Kelly* v. *Kosuga,* 358 U.S. 516 (1959).

eralism are particularly relevant in the circumstances of this case and should have barred such a flagrant abuse of federal equity power.

III. The Decision Below, in Expressly Sanctioning the District Court's Review of the Final Decision of the Illinois Supreme Court, Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Supervision.

The Court of Appeals' express approval of the District Court's assertion of jurisdiction to review the final decision of a state court of highest resort (as to which, moreover, this Court had denied certiorari) also is contrary to fundamental principles underlying the relationship of federal and state courts.

In *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970), this Court pointed out:

> "Thus from the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system".

The Court also warned (*ibid.*):

> "Obviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case."

See also, e.g., *Singer* v. *A. Hollander & Son, Inc.*, 202 F.2d 55, 59 (3d Cir. 1953) (". . . it is not our business to review the correctness of fact conclusions reached by the Vice Chancellor of the State of New Jersey and its Supreme Court"); *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775, 780 (3d Cir. 1975) (". . . the state and lower

federal courts are independent, and . . . a federal action is not superior to a state proceeding merely because of its federal character. . . .As a corollary to this principle, judgments resulting from federal actions are not preferred to judgments resulting from state actions because of their federal character.").

As the District Court in the instant case recognized (App. 19-20), it was without jurisdiction to review the Illinois Supreme Court's decision under the Civil Rights Act, 42 U.S.C. §1983. See, e.g., *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1913). Yet, inexplicably, the District Court concluded that it had such jurisdiction under §16 of the Clayton Act (App. 25). The Court of Appeals "agreed" on the ground that the Illinois Supreme Court "expressly refused to consider" the federal antitrust issues raised by the Stoner group (App. 14).

However, although acknowledged in a footnote (App. 7), the Court below then disregarded the fact that it was the respondents themselves who withdrew the federal antitrust issues from consideration by the state courts, and that it was only for this reason that the Illinois Supreme Court did not pass on those issues. Thus, the Illinois Supreme Court never "expressly refused to consider" the federal antitrust issues. No such issue was even before the Illinois Supreme Court since it had been withdrawn by respondents years before and never raised again, and the Illinois Supreme Court merely noted that fact in its opinion.

In any event, the decision of the Illinois Supreme Court is final and entitled to full faith and credit. This Court, which is the only federal court with power to review the final decision of the highest court of a state, denied certiorari, and the matter should have rested there. The antitrust laws confer no greater power on a federal district court to perform this Court's reviewing functions than the Civil Rights Act or any other federal law. See *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, *supra*, 398 U.S. at 286.

IV. The Decision Below Raises Issues of Broad National Significance and Is Likely to Have a Serious Detrimental Impact on the Relationship between State and Federal Courts.

Under the analysis of the Court below, wherever a federal statute provides for a private injunction action maintainable only in the federal courts, then:

1. The bar of § 2283 would not apply, and state court proceedings would therefore be subject to federal stays without regard to the Anti-Injunction Statute;

2. No considerations of comity or federalism would apply in considering whether to grant such injunctions; and

3. Even a final judgment of a state court, reviewed by the highest court of that state, would be subject to collateral review by a federal district court in such an injunction action.

Through this technique, state court defendants would be able to utilize the federal courts to frustrate and interfere with the state court proceedings in which they are involved, and (as in this case) even to nullify final judgments reviewed by the highest state courts. Moreover, it is not only the antitrust laws that might be utilized in that way by state court defendants,* but indeed many other federal statutes as well.

Review of the decision below is essential, we submit, in view of the critical importance to the Nation's parallel federal and state judicial systems of a clear set of procedural restraints upon improper interference by the courts of one system with those of the other. Such restraints have

---

* At least one such injunction has already been granted by another federal district court on the basis of the District Court's opinion in this case. *Sar Industries, Inc.* v. *Monogram Industries, Inc.*, 1976-1 Trade Cases ¶ 60,816 (C.D. Cal.)

long been recognized as a basic part of our federal-state structure, and this Court has referred to the Anti-Injunction Statute as

> "a limitation of the power of the federal courts dating almost from the beginning of our history and expressing an important Congressional policy—to prevent needless friction between state and federal courts." *Oklahoma Packing Co.* v. *Oklahoma Gas and Electric Co.*, 309 U.S. 4, 8-9 (1939).

The maintenance of that policy, and the "fundamental constitutional independence of the States and their courts," *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers, supra,* 398 U.S. at 287, are seriously threatened by the decision of the Court of Appeals in this case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

EARL E. POLLOCK
GARY SENNER
PHILIP A. HABER
LOUIS C. KEILER
SONNENSCHEIN CARLIN NATH & ROSENTHAL
Attorneys for Petitioner

LAMBERT M. OCHSENSCHLAGER
WAYNE F. WEILER
REID, OCHSENSCHLAGER, MURPHY & HUPP
Of Counsel

Dated: August 4, 1976.

APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals for the Seventh Circuit

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 75-1792 and 75-1793

LEKTRO-VEND CORPORATION, a Delaware corporation; HARRY B. STONER; and STONER INVESTMENTS, INC., a Delaware corporation,

Plaintiffs-Appellees,

v.

THE VENDO COMPANY, a Missouri corporation,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 65 C 1755
RICHARD W. MCLAREN, *Judge.*

ARGUED DECEMBER 8, 1975 — DECIDED MAY 28, 1976

Before SWYGERT and SPRECHER, *Circuit Judges,* and WARREN, *District Judge.*[1]

SWYGERT, *Circuit Judge.* The overall question is whether the district court properly issued a preliminary injunc-

---

[1] The Honorable Robert W. Warren, United States District Judge for the Eastern District of Wisconsin, is sitting by designation.

tion in this antitrust case, thereby staying enforcement proceedings in the Illinois state courts to collect two judgments entered in a suit on an employment contract that contained a noncompetition covenant. Among the specific issues raised is whether section 16 of the Clayton Act, 15 U.S.C. § 26, comes within the "expressly authorized" exception of the anti-injunction statute, 28 U.S.C. § 1183. We hold that it does. We also hold that the district judge did not abuse his discretion in finding the plaintiffs have a likelihood of success on the merits and they would suffer irreparable injury absent an injunction. We therefore affirm the district court's grant of a preliminary injunction.

The Vendo Company is located in Kansas City, Missouri. In 1959 it was a leading manufacturer and seller of vending machines for cold beverages, ice cream, and certain other products. It did not manufacture vending machines for ice cream, candy, cigarettes, sandwiches, or coffee, but was conducting research and development in that area.

Stoner Manufacturing Company, located in Aurora, Illinois, was principally engaged in the manufacture of candy vending machines that had a nationwide market. Compared with Vendo it was a smaller and less diversified enterprise. Harry H. Stoner, his wife, and other members of his family owned all of the Stoner Manufacturing stock. Stoner was the president and controlled the company.

Following negotiations with Stoner, Vendo purchased the assets of Stoner Manufacturing Corporation in April 1959 with the exception of its real estate and buildings. (Upon consummation of the purchase, Stoner Manufacturing was reorganized as Stoner Investments, Inc.) The sales agreement imposed a ten-year noncompetition restriction on Stoner Manufacturing not to own, control, or manage any business engaged in the manufacture or sale

of vending machines. In addition, an employment contract between Vendo and Harry B. Stoner was executed whereby the latter would serve Vendo as a consultant for five years at an annual salary of $50,000. This contract had a noncompetition covenant also. Stoner agreed that during the term of the contract and for five years following the termination of his employment he would not "[D]irectly or indirectly, in any of the territories in which the Company [Vendo] . . . is at present conducting business and also in territories which Stoner knows the Company . . . intends to extend and carry on business . . ." enter into the vending manufacturing business. The employment contract provided that Stoner "[S]hould regulate his own hours of employment and shall determine the amount of time and effort he shall devote . . ." to Vendo.[2]

Almost immediately after the Stoner Manufacturing assets were acquired by Vendo, friction developed between

[2] The full text of the noncompetition clause reads:

5. During the term of this agreement and for a period of five (5) years following the termination of his employment hereunder, whether by lapse of time or by termination as hereinafter provided, Stoner shall not directly or indirectly, in any of the territories in which the Company or its subsidiaries or affiliates is at present conducting business and also in territories which Stoner knows the Company or its subsidiaries or affiliates intends to extend and carry on business by expansion of present activities, enter into or engage in the vending machine manufacturing business or any branch thereof, either as an individual on his own account, or as a partner or joint venturer, or as an employee, agent or saleman for any person, firm or corporation or as an officer or director of a corporation or otherwise, provided however that the Company, its subsidiaries and affiliates shall be excluded from the restrictions hereof and provided also that Stoner shall be permitted to own, hold, acquire and dispose of stocks and other securities which are traded in the investment security market whether on listed exchanges or over the counter.

Stoner and his employer. Stoner complained that his services as a consultant were not being utilized and that he was being treated as a mere figurehead. Very likely this state of affairs prompted the development of the events that lead to the litigation in both the state and federal courts.

For several years before the sale to Vendo, Rod Phillips was the Stoner plant superintendent and his son, Bill, the assistant superintendent. Because of their disagreement with the policies and operations of Vendo, the father and the son resigned from their respective positions in mid-1960. Bill Phillips after quitting Vendo began the design of an electronic coin detecting device and attempted to interest Stoner in financing its development. Stoner evinced interest and agreed to pay the younger Phillips $650 per month to develop the device. It was agreed that any patents on the invention would belong to Stoner Investments. By the end of 1960 a model was completed and a patent applied for. The patent was issued in October 1960 and was assigned to Stoner Investments; however, the patented device was never produced commercially.

About this same time Rod and Bill Phillips developed a machine for vending candy that was radically different from any previous machine. It combined in a novel yet practical design three existing vending machine features: stock rotation (known as "first-in, first-out"), a window to display the product to be vended, and a capacity for stocking mixed items in a single conveyance.[3] At Rod

[3] In 1959 when Stoner Manufacturing sold out to Vendo it was manufacturing a candy vending machine called a "drop shelf" machine. The Phillip's machine, which became known as the "Lektro-Vend" model, was an extension of the "drop shelf" model. After the purchase of the Stoner assets in April 1959, Vendo began experimenting with the same idea as that developed by the Phillipses. Two models were built. Vendo, however, considered the models defective in certain mechanical respects and too expensive to produce. The project was dropped.

Phillips's request Stoner agreed to finance the development of this new machine; however, neither Stoner nor Stoner Investments was to have any ownership or control over the venture. Interest-free loans aggregating $200,000 were made by Stoner to the Phillipses during 1961-62. Stoner also made available a building in Aurora rent free.

By October 1962 prototypes of the machine developed by Rod and Bill Phillips had been constructed and were exhibited at a trade show in San Francisco. The machine won favorable interest in the industry. In the meantime Lektro-Vend Corporation had been organized. The original stockholders were Rod and Bill Phillips, Ruth Netray (Stoner's sister-in-law), and several employees of the corporation.

In December 1962 Mrs. Netray loaned the Phillipses $350,000. The loan was later increased to $525,000. The proceeds of those borrowings were used in part to pay off the $200,000 loan made by Stoner. During that same month Stoner asked Vendo to be released from his employment contract, saying that he had an opportunity to invest in the Lektro-Vend venture. Vendo refused to accede to his request and Stoner was told that Vendo itself was interested in buying the Lektro-Vend machine. Stoner was asked to learn whether Rod Phillips was interested in selling and, if so, to arrange a meeting between Phillips and representatives of Vendo. Stoner reported that Rod Phillips was asking $1,500,000.

Rod Phillips met with certain Vendo officials in January 1963 to show them the operation of the machine. Stoner was present, but took no part in the meeting. In March Stoner wrote Vendo's vice-president that he had told Phillips that he assumed in the absence of any word from Vendo that Vendo no longer had any interest in the patent. The vice-president responded that Vendo was still interested, but that the asking price was too high.

During the summer of 1963 Stoner had a conversation with Vendo's president. Upon inquiry from the latter as to the actual extent of Stoner's involvement with Phillips, Stoner said that his relationship was confined to loans which had been repaid by another person. He did not disclose that the other person was his sister-in-law.

In March 1964 Stoner Investments contracted to sell Lektro-Vend a new plant which had been built in Aurora by Stoner Investments during the previous year. The deal was financed through a bank loan which was subject to an agreement that Stoner Investments would repurchase the property in the event of default.

Stoner's contract of employment terminated June 1, 1964. During that same month Lektro-Vend issued 5,000 shares of stock to Mrs. Stoner and in July it issued 5,000 shares of stock to Stoner Investments. Stoner sent a letter to fifty vending machine operators in which he identified himself with the old Stoner Manufacturing Company and said that he was now interested in Lektro-Vend. He went to great lengths to recommend the Lektro-Vend product. Litigation followed.

Vendo sued Stoner and Stoner Investments in the Illinois state court in August 1965. In October 1965 Lektro-Vend, Stoner, and Stoner Investments sued Vendo in the federal court. The action in the state court was finally terminated in November 1974 when the Illinois Supreme Court denied a petition for rehearing of its decision affirming judgments against Stoner and Stoner Investments, Inc. in excess of $7,000,000.[4]

---

[4] In an attempt to aid the reader to better understand this complex litigation and at the same time to shorten the opinion, a summary of the state court litigation follows.

Vendo v. *Harry B. Stoner and Stoner Investments, Inc.*

The suit was filed in Kane County, Illinois on August 10, 1965; the complaint charged breach of noncompetition covenants; an

The complaint in the federal action alleged violations by Vendo of sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26). The case lay dormant until June 1975 when the district court granted plaintiffs' motion for a preliminary injunction staying defendant's efforts to collect its state court judgments until the merits of the federal suit could be determined. That action precipitated the present appeal under the provisions of 28 U.S.C. § 1292(a).

---

[4] (Continued)
amended complaint also charged theft of trade secrets. After a bench trial the court on December 16, 1966 found for Vendo. Judgments against Stoner for $250,000 and against both defendants for $1,100,000 were granted. Stoner and Stoner Investments were enjoined from further acts of competition.

An appeal was taken to the Appellate Court of Illinois. That court entered its decision on January 30, 1969, 105 Ill. App. 2d 261. The court held that no trade secrets were involved, the noncompetition covenants were valid and enforceable, and the covenants had been breached by the defendants. The grant of injunctive relief was affirmed. The court also held that though the trial court erred in striking the affirmative defense based on the federal antitrust laws, it was correct in denying the defense based on the Illinois antitrust laws. The cause was remanded for a determination of damages and further proceedings.

Upon remand the defendant withdrew its affirmative defense asserted under the federal antitrust laws. The trial court, after hearing evidence, entered judgments against Stoner and Stoner Investments which totaled $7,363,500.

Upon a second appeal to the Illinois Appellate Court, the court decided, on September 12, 1973, 13 Ill. App. 3d 291, that the trial court erred in the measurement of damages. The case was remanded for assessment of damages in accordance with the Appellate Court's original opinion.

Upon appeal to the Illinois Supreme Court on September 27, 1974, 58 Ill. 2d 289, the appellate court was reversed and the trial court's judgments were affirmed. The Supreme Court in deciding the case constructed a different theory of recovery—the breach of a fiduciary obligation on the part of Stoner—then had been asserted by Vendo.

I

The threshold question relates to the authority of a federal court to enjoin a proceeding pending in a state court. Specifically, the question is whether section 2283 of the Judicial Code[5] prevented the district court from issuing a preliminary injunction staying the efforts of Vendo to collect its state court judgments against Stoner and Stoner Investments, Inc.[6]

The underlying purpose of this section, grounded in federalism is "[T]o prevent friction between state and federal courts." *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U.S. 4, 9 (1940). The statute is to be strictly applied *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U.S. 511, 515-16 (1955). Unless one of the three exceptions listed in the statute is evident, it constitutes an absolute ban upon a federal court injunction against a pending state court proceeding. *Atlantic Coast Line R.R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286-87 (1970).

In the instant case the district court held that both the "as expressly authorized" exception and the "in aid of its jurisdiction" exception applied and issued the preliminary injunction. Since we are of the view that the judge was correct in holding the first exception applicable, we need not reach the question raised as to the second exception.

---

[5] 28 U.S.C. § 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

[6] The injunction preserved Vendo's lien and rights under the state court judgments. It also contained detailed provisions regulating the conduct of the judgment debtors during the pendency of the injunction.

Section 16 of the Clayton Act (15 U.S.C. § 26) provides that any person is entitled to sue for and have injunctive relief in any court of the United States having jurisdiction over the parties against threatened loss or damage from violations of the antitrust laws. The complaint in the instant case alleges violations of section 7 and 2 of the Sherman Act (15 U.S.C. §§ 7 and 2) and reads in part:

> On or about August 10, 1965, Vendo filed suit in the Circuit Court for the Sixteenth Judicial Circuit of Illinois against Stoner and Stoner Investments. The full text of the complaint is attached to this complaint as Exhibit C. The complaint alleges that Stoner had breached his agreement not to compete of June 1, 1959 and that Stoner Investments had breached that portion of the April 3, 1959 contract of sale which sought to eliminate competition for 10 years throughout the world. As has been previously alleged, the world-wide non-competition covenants contained in the said contracts are illegal and in violation of the antitrust laws of the United States, particularly Sections 1 and 2 of the Sherman Act. The purpose of the said law suit is to unlawfully harass Stoner and Stoner Investments and to eliminate the competition of Stoner, Stoner Investments and Lektro-Vend. The lawsuit is part of Vendo's plan to monopolize the vending machine manufacturing business. The threats to enforce such non-competition covenants and the bringing of a suit in an attempt to enforce the illegal covenants are overt acts of Vendo in monopolization and constitute an attempt to monopolize the trade or commerce in the State of Illinois among the several states and foreign countries in the manufacture of such vending machines. Lektro-Vend, Stoner and Stoner Investments have been injured in their business and property as a direct and proximate result of these overt acts of Vendo.[7]

---

[7] Other allegations specifically refer to the noncompetition covenants contained in the 1959 agreements.

The question before us is whether section 16 of the Clayton Act, 15 U.S.C. § 26, should be interpreted as coming within the "expressly authorized" provision of section 2283 of the Judicial Code.

The Supreme Court's decision in *Mitchum* v. *Foster*, 407 U.S. 225 (1972), provides guidance. In that case the Court held section 7 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, came within the meaning of the "expressly authorized" exception of the anti-injunction statute. The Court initially noted that, "Despite the seemingly uncompromising language of the anti-injunction statute prior to 1948, [it was] soon recognized that exceptions must be made to its blanket prohibition if the import and purpose of other Acts of Congress were to be given their intended scope." *Id.* at 233-34. The court also cataloged six separate instances in which it had found federal courts empowered to enjoin state court proceedings in carrying out the will of Congress "despite the anti-injunction statute." Mr. Justice Stewart observed that "[i]n addition to the exceptions to the anti-injunction statute found to be embodied in the various Acts of Congress, the Court [has] recognized other 'implied' exceptions to the blanket prohibition of the anti-injunction statute." *Id.* at 235. The relevant criteria to be applied in determining whether an Act of Congress comes within the "expressly authorized" exception were listed: (1) The "federal law need not contain an express reference" to the anti-injunction statute; (2) "[A] federal law need not expressly authorize an injunction of a state court proceeding in order to qualify as an exception"; and (3) "[A]n Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding." *Id.* at 237. Summarizing these criteria, Mr. Justice Stewart wrote: "The test . . . is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of

equity, could be given its intended scope only by a stay of a state court proceeding." *Id.* at 238.

Applying these criteria to section 16 of the Clayton Act, we are of the view that it falls within the "expressly authorized" exception. *Mitchum* noted that section 1983 of the Civil Rights Act "opened the federal courts to private citizens, offering a uniquely federal remedy" in vindicating basic federal rights. *Id.* at 239. So, too, does section 16 of the Clayton Act open the federal courts to private citizens offering a uniquely federal remedy as an important part of the enforcement provisions of the antitrust laws. The private enforcement of these laws by injunctive relief is vested exclusively within the jurisdiction of the federal courts. This jurisdiction would be frustrated if federal courts did not have the power to enjoin a state court proceeding in an appropriate case. The present situation is a classic example. Here Vendo seeks to thwart a federal antitrust suit by the enforcement of state court judgments which are alleged to be the very object of antitrust violations.

Several cases support our holding. In *Helfenbein* v. *International Industries, Inc.*, 438 F.2d 1068 (8th Cir. 1971), decided prior to *Mitchum*, the plaintiffs had filed suit seeking to recover treble damages for violation of the Sherman and Clayton Acts. The loss or damages claimed in the federal suit were due to one plaintiff being forced into arbitration and other plaintiffs being evicted from leased premises—consequences which under the issues presented to the federal court were alleged to have resulted from antitrust violations. The court, in upholding the trial judge's determination to deny an injunction, stated that there was no authority under the federal antitrust laws to enjoin state enforcement or remedy for collection of ordinary debts. The court found that the plaintiffs had "only remotely allude[d] to their potential loss or damage under federal law." *Id* at 1071. There had

been "no attempt in either the arbitration or eviction proceedings to enforce the very conduct . . . prohibited by the Clayton or Sherman Acts." *Id.* The court found that the loss or damage done to the plaintiffs was related to their defenses as provided under *state* law. The loss did not flow from any prohibition under *federal* laws—there was no evidence that the evictions resulted from their refusal to buy according to a "tie-in" agreement they had executed with the defendants. While the court did not expressly decide that injunctive relief would have been proper had the loss or damage been intricately connected to a federal antitrust claim, it is clear from the logic of the decision that this result would have been reached.

Another decision prior to *Mitchum* reached exactly this result. In *United States* v. *Bayer,* 135 F. Supp. 65 (S.D.N.Y. 1955), the court held that a contract between Bayer and I. G. Farber violated the Sherman Act. As part of the afforded relief, the court enjoined an assignee of Faber from enforcing in state court royalty payments under the contract. In holding that section 2283 did not bar the injunction, the court said:

> The answer [to section 2283] is that § 4 of the Sherman Act grants the United States District Court jurisdiction "to prevent and restrain violations" of the Act. The injunction is a necessary incident to the Court's power in order to effectuate its judgment that the Bayer contracts are illegal. Simply to declare the agreement illegal and at the same time permit recovery of the proceeds would render the decree of the court quite sterile. he purpose of the decree is not only to prevent repetition of past offenses but also "to prevent the defendants from acquiring any of the fruits of the condemned project." 135 F. Supp. at 73.

Studebaker Corp. v. *Gittlin,* 360 F.2d 692 (2d Cir. 1966), is also instructive. In an appeal by a stockholder from an order of the district court enjoining the use of other stock-

holder authorizations obtained without compliance with the proxy rules in a state court proceeding to obtain inspection of Studebaker's shareholders' lists, the Second Circuit held that section 2283 did not bar the injunction. The court distinguished the federal securities statutes which afford enforcement by private parties from the provisions of the National Labor Relations Act which restrict the enforcement of its provisions to the National Labor Relations Board. Judge Friendly, writing for the court, stated: "Section 16 of the Clayton Act . . . affords a closer parallel, since there as here the private suit plays an important part in enforcement." 360 F.2d at 698. He concluded that "where the very act of prosecuting the state proceeding violated federal law . . .," section 2283 did not stand in the way of enjoining the state court action. *Id.*[8]

When Congress enacted the various antitrust laws it created federal rights and remedies enforceable by private parties in a federal court of equity. That such powers were vested exclusively in the federal courts reflect the Congressional belief that the national objectives of the antitrust laws will be effectuated if entrusted to the jurisdiction of the federal courts. If federal courts are prohibited from enjoining state court proceedings which are part of an anticompetitive scheme in violation of the federal antitrust laws, the full scope and force of those laws will be seriously impaired. Moreover, the national interest in the preservation of competition—one of our most important public policies—would be frustrated. Accordingly, we hold that section 16 of the Clayton Act constitutes an "expressly authorized" exception to the anti-injunction provision of the Judicial Code.

Vendo further contends that even if the district court was not barred by section 2283 from issuing the injunction,

---

[8] *Gittlin* was cited in *Mitchum* (407 U.S. at 237, n. 25) in discussing the meaning of the "expressly authorized" exception.

principals of comity and federalism constitute a bar. The principle of comity has no applicability when the exclusive remedy for an injury lies in the federal court. We are in agreement with the trial court's observation:

> Principles of comity and federalism do not prevent the issuance of an injunction considering the peculiar nature of this case. The federal action here is based in part on the very proceeding sought to be enjoined. If federal law is violated by continuation of the state action the paramount national interest requires court intervention. *Lektro-Vend Corp.* v. *Vendo Company,* 403 F. Supp. 527, 537 (N.D. Ill. 1975).

It is also argued that the district court lacked jurisdiction to reverse, review, or revise the state court judgments in a collateral attack. While the district court conceded that it had no power to directly review cases from state courts, it went on to point out that here the plaintiffs' claim that "[T]he state court proceedings did not take account of Vendo's violations of antitrust law and were prosecuted in violation of Sections 1 and 2 of the Sherman Act . . ." *Id.* at 529. Therefore, the "[S]tate court proceedings must be examined by this Court for the purpose of determining whether Vendo prosecuted those cases as part of an anti-competitive scheme." *Id.* at 532. The judge additionally commented: "The final Illinois Supreme Court opinion makes such a review imperative. The Illinois court expressly refused to consider the allegations that the state proceedings were part of an anti-competitive scheme. Plaintiffs, having never had a trial on this issue, must be heard in the only forum now available." *Id.* at 532, n. 4. We agree with these comments.

II

In determining that interlocutory relief was appropriate, the district court concluded that the plaintiffs had demonstrated a likelihood of ultimate success on the merits of their

claims. Defendant attacks this ruling by arguing that there was a total failure of proof. It says that the state court judgments are based on Stoner's violation of fiduciary duties and do not depend (contrary to the trial judge's findings) on the noncompetition covenants. Additionally, it is argued that the covenants are lawful when tested by antitrust standards.

In the first place, defendant's attack is overbroad. As we said in *Bath Industries* v. *Blot,* 427 F.2d 97, 111 (7th Cir. 1970), "[I]t is not necessary that the trial court find the certainty of a wrong, a likelihood is sufficient." Furthermore, since the grant of a temporary injunction rests within the sound discretion of the trial court, *Prendergast* v. *New York Telephone Co.,* 262 U.S. 43 (1923), appellate review is narrow. *Scherr* v. *Volpe,* 466 F.2d 1027 (7th Cir. 1972).

Secondly, when the Supreme Court of Illinois affirmed the judgments on the unadvanced theory that Stoner had violated his fiduciary duties, it did not consider or decide any of the antitrust issues presented here. It did not and could not evaluate Vendo's alleged monopolistic scheme which included the enforcements of the noncompetition covenants. The district court found that the covenants were "overly broad" and that there was substantial evidence that Vendo had the "required specific intent to monopolize" in a relevant market. Given the limitations of our review, we cannot say the trial court erred.

The judge states in his memorandum opinion:

> On the record as a whole, the Court finds that a preliminary injunction will prevent irreparable harm, protect the public interest, and will benefit plaintiffs more than it will burden Vendo. Continued efforts at collection will prevent Lektro-Vend Corporation from marketing a promising, newly-developed vending machine. The state court collection process places insurmountable barriers in the way of raising capital

for any expansion program. Moreover, collection of the state judgment will effectively place Lektro-Vend in the hands of—or at least at the disposition of—Vendo. Stoner Investments is controlled by Mr. Stoner; 78.57% of Lektro-Vend is owned by Stoner Investments. Needless to say, Vendo would also control Stoner Investments. The case or controversy requirement contained in Article III then would require dismissal of Lektro-Vend and Stoner Investments. Continued collection thus would eliminate two of the plaintiffs herein. Moreover, Mr. Stoner's ability to effectively prosecute this action would be severely limited by further execution of the state court case. This also amounts to irreparable harm. (Citations omitted.)

We are not prepared to say that the court erred in reaching these conclusions.

Defendant's last contentions are that laches, waiver, and collateral estoppel bar injunctive relief. Issues not raised in the trial court cannot be presented for the first time on appeal. *United States* v. *Tyrrell*, 329 F.2d 341, 345 (7th Cir. 1964). As we noted in *Hamilton Die Cast, Inc.* v. *United States F. & G. Co.*, 508 F.2d 417, 420 (7th Cir. 1975): "[A] trial court should not be reversed on grounds that were never urged or argued below." Defendant failed to raise these issues in the trial court. Regardless of this procedural defect, we are convinced that these contentions are without merit.

The grant of interlocutory relief is affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Order and Judgment of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

May 28, 1976

Before

Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. ROBERT W. WARREN, District Judge*

LEKTRO-VEND CORP., etc., et al.,
Plaintiffs-Appellees,

No. 75-1792 & 75-1793 vs.

THE VENDO COMPANY, etc.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division No. 65 C 1755

The Honorable
Richard W. McLaren,
Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

* Honorable Robert W. Warren, United States District Judge for the Eastern District of Wisconsin, is sitting by designation.

APPENDIX C

Order of the United States Court of Appeals for the Seventh Circuit, On Rehearing

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

July 16, 1976

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. ROBERT W. WARREN, District Judge*

LEKTRO-VEND CORP., etc., et al., **Plaintiffs-Appellees,** **No. 75-1792, 75-1793 vs.** **THE VENDO COMPANY, etc.,** **Defendants-Appellants.**	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. **No. 65 C 1755**

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above entitled cause be, and the same is hereby, DENIED.

Note: Judges Cummings, Pell and Tone did not participate in the disposition of this petition.

* The Honorable Robert W. Warren, United States District Judge for the Eastern District of Wisconsin, is sitting by designation.

APPENDIX D

Opinion of the United States District Court for the Northern District of Illinois

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEKTRO-VEND CORP., a Delaware corporation, **HARRY B. STONER** and **STONER INVESTMENTS, INC.**, a Delaware corporation, **Plaintiffs,** **v.** **THE VENDO COMPANY**, a Missouri corporation, **Defendant.**	**No. 65 C 1755**

MEMORANDUM OPINION AND ORDER

I.

This is a complex antitrust action[1] by Lektro-Vend Corporation, Harry B. Stoner and Stoner Investments, Inc.,

[1] Plaintiffs also assert a civil rights claim pursuant to 42 U.S.C. § 1983 claiming certain portions of the Illinois Supreme Court decisions violated procedural and substantive due process. The Court has no jurisdiction to entertain this claim. *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923); *Louis Ender Inc.* v. *General Foods Corp.*, 467 F.2d 929 (8th Cir. 1972); *Sarelas* v. *Slechan*, 326 F.2d 490 (7th Cir. 1963). As explained in *Adkins* v. *Underwood*, 370 F. Supp. 510, 514-15 (N.D.Ill. 1974):

> "While lower federal courts were given certain power in the Judiciary Act of 1789, they were not given any power to directly review cases from state courts, and they have not been

(Footnote continued on following page.)

plaintiffs, against the Vendo Company, the defendant. Vendo recently obtained a $7,345,500 state court judgment against Mr. Stoner and Stoner Investments for violation of their purported fiduciary duties to Vendo. *Vendo* v. *Stoner*, 58 Ill.2d 289, N.E.2d (1974), *cert. denied*, U.S. (1975). Plaintiffs[2] now seek a preliminary injunction preventing Vendo from taking any further steps, pending a trial of this case, to collect its state court judgment, urging that the state court proceedings did not take account of Vendo's violations of antitrust law and were prosecuted in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. For the reasons and on the conditions stated below, the motion will be granted. Insofar as required, this opinion shall constitute the Court's findings of fact and conclusions of law. F.R.Civ.P. 52(a), 65(d).

(Footnote continued from preceding page.)

given such power since that time. . . . Only the Supreme Court is authorized to review on direct appeal the decision of state courts. From the beginning this country has had two essentially separate legal systems. Each system, federal and state, proceeds independently of the other with ultimate review in the United States Supreme Court of federal questions raised in either system.

"Even if a state court decision is constitutionally wrong, that does not make the judgment void, it merely leaves it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. Under the legislation of Congress, no court of the United States other than the United States Supreme Court can entertain a proceeding to reverse or modify a state court judgment which is in error."

[2] The motion for preliminary injunction only sought relief for Mr. Stoner and Stoner Investments, not Lektro-Vend Corporation. It is clear, however, that the hearing litigated the interests of all three plaintiffs and that Vendo acquiesced in this procedure. Plaintiff's motion to amend the motion to include Lektro-Vend is therefore granted.

To demonstrate the necessity of a preliminary injunction a brief excursion into the history of the relationship between the parties is required. This action has its genesis in the 1959 purchase of Stoner Manufacturing Corp. by Vendo. This sale was occasioned primarily by Mr. Stoner's health problems. At that time Stoner Manufacturing was primarily a producer of candy vending machines throughout the United States. Vendo prior to 1959 was a manufacturer of beverage and ice cream vending machines. The record in the state court proceedings and here demonstrates that Vendo had two purposes in purchasing Stoner Manufacturing: expansion of its product line[3] and elimination of Mr. Stoner as a potential competitor in the vending machine market. The parties agree that Mr. Stoner was a design genius in creating innovative vending machine products.

The sale agreement between Vendo and Stoner Manufacturing provided that Vendo would pay the Stoner interests $3,400,000 and deliver 60,000 shares of Vendo stock to Mr. Stoner. This made Mr. Stoner a major shareholder of Vendo. Mr. Stoner also became an officer and director of Vendo. His employment contract with Vendo had a five year term and his salary was $50,000 per year. The 1959 agreements also provided that Stoner Manufacturing would not directly or indirectly participate in the management, ownership or control of a vending machine business for ten years in the United States or any foreign country in which Vendo was doing business. Mr. Stoner's employment contract provided that for a period of five years following the termination of his employment, Mr. Stoner would not compete with Vendo in any territory in which Vendo was doing business or intended to do business.

---

[3] Federal Trade Commission approval was required before Vendo could purchase the Stoner vending machine interests. Apparently this was accomplished by misrepresenting to the Commission that Stoner Manufacturing and Vendo were not actual or potential competitors. The record demonstrates that at the least Vendo was a potential competitor of Stoner Manufacturing.

Shortly after the 1959 agreements were consummated Mr. Stoner and Vendo had a falling out. Mr. Stoner had been led to believe he would be able to take an active role in research and development and would be treated as chairman of the board with respect to operation of the purchased assets of Stoner Manufacturing. In actuality Mr. Stoner was virtually ignored or bypassed by the Vendo management. The Vendo management admittedly was thus only paying Mr. Stoner not to compete rather than employing him for performance of actual services.

The succeeding events are adequately set out in the first opinion of the Illinois Court of Appeals at 105 Ill.App.2d 261, 269-77. During the fall of 1960 Mr. Stoner began financing vending machine research and development by certain former Stoner Manufacturing employees. This work culminated in the development of a revolutionary first-in-first-out (FIFO) candy vending machine, called the Lektro-Vend machine. The first prototypes of the Lektro-Vend were exhibited at a trade show in October 1962. Vendo employees were present and made initial inquiries about purchasing the design. The inventors, however, decided to manufacture and market the machine on their own. Mr. Stoner was asked to join these efforts. Thus in December 1962 Mr. Stoner sought to be released from his Vendo employment contract stating that he wanted to invest in the Lektro-Vend machine. Mr. Stoner did not disclose at that time his previous backing of the Lektro-Vend project.

Vendo refused the release request because it did not want to compete with Stoner. Vendo officials stated that part of the consideration for the 1959 agreements was the non-competition clauses. Instead, Stoner was requested to help Vendo purchase the Lektro-Vend from the inventors. The inventors sought $1,500,000; Vendo thought this price too high and declined to purchase the machine. Vendo also thought that there were inherent technical problems in the Lektro-Vend and that it was too costly to

produce. Mr. Stoner warned that was a serious mistake not to purchase the Lektro-Vend.

Some time shortly after the Vendo refusal to purchase the Lektro-Vend, Mr. Stoner revealed his financial support of the Lektro-Vend inventors. It appears, however, that Vendo was well aware of the Stoner involvement with Lektro-Vend as early as the 1962 trade show.

Mr. Stoner's and Stoner Investments' involvement with the Lektro-Vend inventors and the Lektro-Vend Corporation continued. Stoner Investments helped Lektro-Vend Corporation establish a production plant and further loans or loan guarantees were made by both Mr. Stoner and Stoner Investments. Meanwhile Mr. Stoner's employment contract with Vendo terminated on June 1, 1964, although Mr. Stoner remained on the Vendo board until the spring of 1965. It is clear, however, that neither Mr. Stoner nor Vendo thought until late in the state court litigation that this relationship created for Mr. Stoner any further obligations beyond those duties purportedly contained in the non-competition covenants.

In March 1965 Lektro-Vend salesmen reported that Vendo salesmen were circulating rumors in the trade that Lektro-Vend was about to go out of business. Mr. Stoner responded with a letter to 50 vending machine operators. This letter, denominated by the parties as the "Dear Operator" letter, stated that Stoner was now "interested" in Lektro-Vend Corporation and would guarantee its continued existence.

Conflict between the parties sharpened in August 1965 when Vendo brought suit against Mr. Stoner and Stoner Investments. The Court proposes to examine these proceedings only insofar as they may reflect illegal anti-competitive conduct by Vendo. The original Vendo complaint focused on alleged violation of the non-competition covenants in the employment and sales agreements and sought $500,000 in damages. This complaint was amended to add

a charge of theft of trade secrets and the ad damnum was raised to $1,500,000. An injunction against Stoner and Stoner Investments preventing further aid to Lektro-Vend running until July 1, 1969 was also sought. The Illinois Appellate Court opinion after the first trial reveals that the evidence during the first trial was directed to the covenants and the trade secrets issue. After the first trial, the Illinois trial court entered judgment against Mr. Stoner for $250,000 for violation of the covenants and $1,100,000 for theft of a trade secret. The Appellate Court at 105 Ill.App.2d 261 reversed as to the latter, stating that Vendo had no trade secret. It is clear from all the evidence that Vendo should have known that there was no theft of a trade secret; indeed, the first Illinois Court of Appeals' decision demonstrates that the effort by Vendo to prove theft of a trade secret amounted to vexatious litigation.

The Appellate Court remanded the case with directions for further hearings on damages. Before the second state trial, Vendo again raised the ad damnum, this time to $7,345,500. At trial, however, Vendo attempted to prove the entirely new theory that Stoner was legally at fault for Vendo's failure to have a FIFO machine. On this basis, the trial court entered judgment against Stoner for $170,835 for forfeiture of salary for the time in which he purportedly illegally competed, and for $7,345,500 against Stoner and Stoner Investments for the lost profits for failure of Vendo to have a FIFO machine. Mr. Stoner and Stoner Investments again appealed and the Appellate Court again reversed, stating that Vendo's failure to have a FIFO vending machine was not attributable to the Stoner interests. The salary forfeiture was affirmed. Each side was then granted leave to appeal to the Illinois Supreme Court.

The Illinois Supreme Court reinstated the trial court judgment, predicating liability on a corporate opportunity theory. It held that as a director of Vendo Mr. Stoner breached his fiduciary duty by failing to adequately disclose his financial involvement in the Lektro-Vend machine.

The court thus concluded that it could not say that Vendo would have declined to purchase the Lektro-Vend machine had adequate disclosure been made or a genuine opportunity to purchase existed. It affirmed the $7,345,500 damage award on the Vendo lost profits theory. The Stoner interests sought a rehearing on the grounds that the corporate opportunity theory denied it substantive and procedural due process because Stoner was functionally denied a trial on this issue. The Illinois Supreme Court denied the petition for rehearing and a petition for certiorari was subsequently denied by the United States Supreme Court. As noted above, the Court believes that it does not have jurisdiction to review the due process aspects of the state court proceedings; however, as will be more fully explained below, the state court proceedings must be examined by this Court for the purpose of determining whether Vendo prosecuted those cases as part of an anti-competitive scheme.[4]

II.

Three legal issues are raised by the brief outline of facts just concluded: (1) Have plaintiffs established under the four usual requirements that a preliminary injunction is necessary? (2) Have plaintiffs met their special burden of establishing the necessity for enjoining a state court proceeding? (3) Assuming an injunction is necessary, what type of bond is appropriate?

A.

The four factors usually examined to determine whether interlocutory relief is appropriate are:

(1) likelihood of ultimately prevailing on the merits;

---

[4] The final Illinois Supreme Court opinion makes such a review imperative. The Illinois court expressly refused to consider the allegations that the state proceedings were part of an anticompetitive scheme. Plaintiffs, having never had a trial on this issue, must be heard in the only forum now available.

(2) likelihood of irreparable harm;

(3) balancing the hardships; and

(4) protection of the public interest.

In the instant case, this Court believes that plaintiffs have demonstrated likelihood of ultimate success on both the section 1 and section 2 Sherman Act claims. The section 1 claim arises from the 1959 agreement. Under section 1 of the Sherman Act, contracts which unreasonably restrain interstate commerce are void. The federal antitrust laws make covenants not to compete which are overly broad in geographical scope or in time unreasonable restraints of trade. Once antitrust jurisdiction is invoked, the validity of the challenged covenants is measured solely under federal law, regardless of legality under state law. *Schine Chain Theatres* v. *United States,* 334 U.S. 119 (1948).

Under federal law a non-competition covenant is legal under two conditions:

(1) the covenant is merely ancillary to the main purpose of a lawful contract;

(2) the covenant is necessary to protect the legitimate property interests purchased by the covenantee. See *United States* v. *Addyston Pipe & Steel Co.,* 85 F. 271 (6th Cir. 1898), *aff'd as modified,* 175 U.S. 211. Moreover, a covenant not to compete examined in light of other monopolistic practices can be declared illegal even if otherwise lawful if it can be shown that the object and the effect of the agreement was primarily directed at the elimination of competition. *Schine Chain Theatres* v. *United States, supra; Bowl America, Inc.* v. *Fair Lane, Inc.,* 299 F.Supp. 1080 (D.Md. 1969).

Here it appears that the covenants extracted were overly broad, and the facts and circumstances surrounding the 1959 agreement and subsequent activities demonstrate that their object (and effect) were primarily directed at the

elimination of competition rather than protection of good will. As drafted, the covenants were intended to protect the good will of Vendo where Vendo was doing or planning to do business; they were not limited to areas in which Stoner Manufacturing was operating. Under *Addyston Pipe* and similar cases this amounts to prima facie proof of illegality. Additionally, Vendo's president admitted the major purpose and intent of the employment contract was to obtain the anticompetitive benefits accruing from the covenants. It should also be noted even after Vendo received notice that Stoner was involved in the Lektro-Vend project it refused to terminate his employment as the contract allowed. It appears to the Court that this course of conduct was adopted by Vendo in an attempt to limit Mr. Stoner's activities for the full planned term of the post-employment agreement, showing that protection of good will was not a significant goal in obtaining the covenant. Since Mr. Stoner apparently was never called upon to perform significant services for Vendo the covenant amounted to a naked agreement not to compete, solely anticompetitive in purpose and effect.

Vendo argues that even if the covenants are illegal under section 1 of the Sherman Act, the state court judgment did not rely on these contractual terms and therefore is unassailable. The section 1 claim does not rest alone on the theory that the state litigation was an essential part of an illegal anticompetitive scheme but rather depends on an analysis of the total circumstances surrounding creation of the 1959 agreements. The Court believes that viewed in this light the corporate opportunity theory relied on in the final state court decision cannot either in logic or as a matter of federal antitrust law be separated from the anticompetitive intent and effect of the covenants. Mr. Stoner's position as a director was dependent on the acquisition and employment contracts. He would not have become a corporate director of Vendo absent entry of the anticompetitive agreements. Additionally, his status as a director clearly was not intended to create additional

duties; it only encompassed duties already undertaken as an employee of Vendo. The general rule that where a contract is only partially illegal under the antitrust laws, the illegal portions can be severed, is therefore inapposite. Here the anticompetitive clauses are essential primary elements of the bargain and thus cannot be severed, making all elements of the 1959 agreements unenforceable. See *Superior Bedding* v. *Serta Assoc., Inc.*, 353 F.Supp. 1143 (N.D.Ill. 1972). See also *Reynolds Metals Co.* v. *Metals Disintegrating Co.*, 8 F.R.D. 347 (D.N.J. 1948), *aff'd* 96 F.2d 90 (3d Cir. 1949). Vendo's reliance on the ultimate theory of the state court litigation thus is not well taken. The 1959 agreements were cut from one piece of anticompetitive cloth and cannot be snipped apart.

Plaintiffs also argue that a violation of the "attempt to monopolize" proscription of section 2 of the Sherman Act occurred here. To prove violation of section 2, plaintiffs must establish three elements of proof: (1) a dangerous probability of actual monopolization in a relevant market; (2) specific intent to establish a monopoly power; and (3) overt acts. Plaintiffs need not prove that Vendo has succeeded in establishing monopoly power but must merely show that Vendo has the capacity to make a serious attempt to acquire monopoly status. *Lorain Journal* v. *United States*, 342 U.S. 143 (1951); *Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc.*, 452 F.2d 579 (7th Cir. 1971).

In the instant case the relevant market is a recognized sub-market within the vending machine industry—coin operated food and beverage vending machines. Lektro-Vend and Vendo are actual competitors in the sub-market, although the price structure of the industry prevents absolute congruity of competition. The geographic market is nationwide in scope. Within this market the number of competitors has been steadily declining. Between 1958 and 1966 the number of vending machine manufacturers was nearly halved and the number of competitors with sales over $100,000, particularly in the candy bar section of the industry, became quite small. Within this increasingly con-

centrated market, Vendo maintained a significant market share. While it appears that the evidence is somewhat in conflict, Vendo's market share is most probably over 20%. The "attempt to monopolize" prohibition in section 2 was intended to "nip incipient monopolies in the bud"; with this congressional policy in mind, considering the structure of the vending machine industry, the Court believes that, unchecked, Vendo's alleged practices raise a dangerous propensity for creation of an actual monopoly.

The Court also finds that plaintiffs have produced substantial evidence that Vendo had the required specific intent to monopolize and that it performed overt acts intended to create a monopoly position. Prior to 1959, Vendo had an aggressive acquisition program to buttress its product line and market share. The courts have consistently held that such conduct, along with other evidence of anticompetitive conduct, is persuasive evidence of an attempt to monopolize. See *e.g., United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966). Vendo's uniform policy of extracting broad covenants not to compete—such as the ones involved in the instant litigation—also evidences specific intent to monopolize. In addition, there is evidence that Vendo used litigation as a method of harassing and eliminating competition.

The right to litigate commercial controversies comes within the penumbra of the first amendment. *Cf. Eastern R.R. Pres. Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). However, if litigation is used as an integral part of a scheme attempting to monopolize and exclude competition from the marketplace, that litigation can lose its first amendment protection. *Walker Process Equip.* v. *Food Mach. Corp.*, 382 U.S. 172 (1965). As the Supreme Court stated in *California Motor Transport:*

> "It is well settled that First Amendment rights are not immunized from regulation when they are used as

> an integral part of conduct which violates a valid statute . . . . If the end result is unlawful, it matters not what the means used in violation may be lawful." 404 U.S. at 5145

This holding was recently reaffirmed in *United States* v. *Otter Tail Power Co.*, 410 U.S. 366 (1973); *aff'd after remand*, 417 U.S. 901 (1974). Thus if plaintiffs can prove that Vendo's state court litigation against the Stoner interests was not a genuine attempt to use the adjudicative process legitimately, antitrust liability in the instant case under section 2 of the Sherman Act would follow. *Cf. Metro Cable Co.* v. *CATV of Rockford*, 74-1492 (7th Cir. April 2, 1975). See also *Mach-Tronics Inc.* v. *Zirpoli*, 316 F.2d 820 (9th Cir. 1963) (antitrust liability arises from anticompetitive institution of state trade secret case); *Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F.2d 416 (10th Cir. 1952).

There is persuasive evidence that Vendo's activities in its litigation against the Stoner interests in Illinois state court were not a genuine attempt to use the adjudicative process legitimately. Its theft of trade secret claim was clearly non-meritorious and litigation of this claim might well be interpreted—considering the record as a whole—as an attempt to further harass the Stoner interests and limit the amount of aid Stoner could lend Lektro-Vend. The attempt to enforce the covenants not to compete by way of injunction and damages may be similarly indication of a violation of section 2. It may also be argued that, had this litigation been legitimately undertaken to protect good will or confidential information, Vendo would have exercised its right to terminate Mr. Stoner's employment as soon as it discovered Mr. Stoner's relationship with the Lektro-Vend project; instead it prolonged Mr. Stoner's employment for the full term even though he was given no duties. As noted above, the intent of this action appears to have been to lengthen the period for which the non-competition covenants would run. The purpose of this portion of the state litigation seems purely anticompetitive. If so, this

scheme was successful, for the state litigation severely hampered Lektro-Vend's development.

Despite the above stated line of reasoning, defendant contends that the Supreme Court's decisions in *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743 (1947) and *Kelly* v. *Kosuga*, 358 U.S. 516 (1959) bar injunctive relief under the instant circumstances. These cases hold that the antitrust laws provide no defense for actions under state law for collection of debts for sale of goods and services:

> "If the contract provisions sued on in the state court do not embody or further the anti-competitive practices, then there has been no irreparable loss or damage from *violation of the antitrust law*" requiring injunctive relief.

Response of Carolina v. *Leasco Response, Inc.*, 408 F.2d 314, 319 (5th Cir. 1974).

However, when the precise conduct proscribed by the antitrust laws is sought to be furthered in a state court action, the antitrust defense and injunctive relief are available in federal court. *Continental Wallpaper Co.* v. *Lewis Voigt & Sons*, 212 U.S. 227 (1909). See also *Farbenfabriken Bayer, A.G.* v. *Sterling Drug, Inc.*, 307 F.2d 207 (3d Cir. 1962). *Bruce's Juices* and *Kelly* therefore do not apply. If the state court litigation was itself part of the anticompetitive scheme, a judgment arising from such litigation is not an ordinary debt.

On the record as a whole, the Court finds that a preliminary injunction will prevent irreparable harm, protect the public interest, and will benefit plaintiffs more than it will burden Vendo. Continued efforts at collection will prevent Lektro-Vend Corporation from marketing a promising, newly-developed vending machine. The state court collection process places insurmountable barriers in the way of raising capital for any expansion program. Moreover, collection of the state judgment will effectively place Lektro-Vend in the hands of—or at least at the disposition

of—Vendo. Stoner Investments is controlled by Mr. Stoner; 78.57% of Lektro-Vend is owned by Stoner Investments. Needless to say, Vendo would also control Stoner Investments. The case or controversy requirement contained in Article III then would require dismissal of Lektro-Vend and Stoner Investments. *Cf. Mar Foods* v. *First Nat'l Bank of Chicago,* 73 C 1959 (N.D.Ill. November 6, 1974). Continued collection thus would eliminate two of the plaintiffs herein. Moreover, Mr. Stoner's ability to effectively prosecute this action would be severely limited by further execution of the state court case. This also amounts to irreparable harm. *Milsen* v. *Southland,* 454 F.2d 363 (7th Cir. 1972).

In the Court's view, the public interest also requires issuance of a preliminary injunction. Few public policies are more important than protection of competition. In the instant case, as previously mentioned, the number of competitors in the vending machine market is declining. Thus the courts have a duty to vigilantly protect the remaining competition. The balance of equities also favors plaintiffs. Vendo's state judgment is protected by judgment liens and security agreements. Stoner and Stoner Investments, despite Vendo's protestations to the contrary, have substantially complied with these agreements. Vendo has already realized over $582,000 from an escrow trust agreement. If it is ultimately successful here, its only loss will be certain interest payments which the Stoner interests concededly cannot pay. On the other hand, the Stoner interests and Lektro-Vend's losses arising from denial of the preliminary injunction will be severe, as demonstrated above. See *Semmes Motors, Inc.* v. *Ford,* 429 F.2d 1197 (2d Cir. 1970).

B.

Because they seek an injunction against state court proceedings, plaintiffs are faced with a special burden. The anti-injunction statute, 28 U.S.C. § 2283, prohibits issuance of an injunction to stay proceedings, in a state court except

under three conditions: (1) when expressly authorized by an act of Congress, (2) where necessary in aid of jurisdiction, and (3) to protect or effectuate federal judgments. Moreover, the principles of comity and federalism militate against unnecessarily interfering with pending state court actions even if § 2283 is satisfied. *Mitchum* v. *Foster,* 407 U.S. 225 (1972).

There is a paucity of authority on the issue of whether the injunction provisions contained in 15 U.S.C. § 26 provide express congressional authorization to grant injunctions against state court actions. *United States* v. *Bayer,* 135 F. Supp. 65 (S.D.N.Y. 1955) indicates that express authorization is provided while *Helfenbein* v. *International Ind., Inc.,* 498 F.2d 1068 (8th Cir. 1971) states no such authority exists. The Supreme Court's decision in *Mitchum* v. *Foster, supra,* seems to clarify the issue. In *Mitchum,* a 42 U.S.C. § 1983 case, the Court held that to qualify under the "expressly authorized" exception of the anti-injunction statute, a federal law need not contain an express reference to § 2283 nor expressly authorize an injunction of a state court proceeding. To qualify as an expressly authorized exception the statute would, however, have to create

> "a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding." 407 U.S. at 237.

These tests are equally applicable to antitrust actions. When Congress passed the various antitrust laws it clearly created federal rights and remedies enforceable in a federal equity court. In fact, such power was exclusively vested in the federal court system, indicating congressional approval of enjoining certain state actions, if necessary. *Cf. Lemelson* v. *Ampex,* 372 F. Supp. 708 (N.D. Ill. 1974). This Court therefore holds that these laws, in the instant case, can only be given their intended scope by staying the state court proceedings and that § 2283 authorizes an injunction here

where the state court proceedings are part of the anti-competitive scheme.

The Court also holds that § 2283 authorizes an injunction here because further collection efforts would eliminate two plaintiffs, Stoner Investments and Lektro-Vend Corp., as parties under the case or controversy provisions of Article III since they would necessarily be controlled by Vendo. Vendo's offer to place the Stoner Investment and Lektro-Vend stock under control of the Court does not meet this problem because as a matter of substance Vendo would control both plaintiff and defendant, requiring dismissal under Article III. Thus the injunction is also necessary to protect the jurisdiction of the Court. Principles of comity and federalism do not prevent the issuance of an injunction considering the peculiar nature of this case. The federal action here is based in part on the very proceeding sought to be enjoined. If federal law is violated by continuation of the state action the paramount national interest requires court intervention.[5]

C.

Since the Court has determined that a preliminary injunction should issue, the terms and conditions of the injunction must be determined. The first issue is what type of security must plaintiffs produce pursuant to F.R.Civ.P. 65(c). The amount of security required is within the sound discretion of the court and is intended to protect against such cost and damages as may be incurred by any party wrongfully restrained or enjoined. However, there is no liability for damages resulting from issuance of an injunction erroneously granted unless the suit was prosecuted maliciously and without probable cause. See 7 *Moore's Federal Practice* ¶ 65.10 at p. 98 and cases cited therein.

[5] The findings contained herein are interlocutory in nature necessarily based on an incomplete record. Of course, a complete trial specifically directed to the issues in this case might produce evidence requiring a different or more limited result.

Because the plaintiffs have placed considerable evidence in the record demonstrating illegal anticompetitive behavior on the part of Vendo, it seems unlikely that Vendo will be able to prove any compensable damage arising from issuance of this injunction. Moreover, since this injunction will not remove the pre-existing judgment liens, Vendo remains well protected. Accordingly, a nominal bond of $2,500.00 (Twenty Five Hundred Dollars) will be required. See *Scherr* v. *Volpe*, 466 F.2d 1027 (7th Cir. 1972); *Urbain* v. *Knapp Bros. Mfg.*, 217 F.2d 810 (6th Cir. 1954).

The remaining issue concerns the scope of the preliminary injunction. Such an injunction should protect plaintiffs from harm due to collection of the state court judgment while preserving the Stoner interests' assets so that Vendo will be able to collect on the judgment if it is ultimately successful. The Court believes that these two goals can be accomplished by enjoining further collection efforts but leaving intact those portions of the state decrees (and liens) which prevent transfer of any of the Stoner assets. As previously indicated, Mr. Stoner and Stoner Investments will be required to pay all taxes, utilities and maintenance from currently collected income to preserve the assets. Plaintiffs shall prepare and present on notice a draft order in conformance with the views expressed herein within ten (10) days.

IT IS SO ORDERED

ENTERED:

/s/ R. W. MCLAREN
United States District Judge

DATED: May 29, 1975

APPENDIX E

Preliminary Injunction Order of the United States District Court for the Northern District of Illinois

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEKTRO-VEND CORP., a Delaware corporation, **HARRY B. STONER** and **STONER INVESTMENTS, INC.**, a Delaware corporation, **Plaintiffs,** v. **THE VENDO COMPANY**, a Missouri corporation, **Defendant.**	**No. 65 C 1755**

ORDER GRANTING PRELIMINARY INJUNCTION

THIS CAUSE COMING ON FOR HEARING on plaintiffs' motion for a preliminary injunction and the Court having considered the pleadings, the record, the evidence and argument and the post-trial briefs submitted by the parties, and the Court having made its findings of fact and conclusions of law, as more particularly appear in its Memorandum Opinion and Order dated May 29, 1975; and

IT APPEARING TO THE COURT:

1. That the plaintiffs have demonstrated likelihood of ultimately prevailing on the merits of their claims under Section 1 and Section 2 of the Sherman Act, as alleged in Count I of the Amended and Supplemental Complaint;

2. That the balance of equities favors plaintiffs in that the harm to defendant from the issuance of the preliminary

injunction will be slight, whereas denial thereof would result in severe loss to plaintiffs;

3. That plaintiffs will suffer irreparable harm if a preliminary injunction is not granted in that the continued action of the defendant in collecting its state court judgments, hereinafter enjoined: (a) will prevent LEKTRO-VEND from marketing a promising, newly-developed vending machine, and put insurmountable barriers in the way of its raising capital necessary to the prosecution of its business; (b) will effectively place STONER INVESTMENTS, INC. and LEKTRO-VEND CORP. under the control of defendant, which would require dismissal of the action under Article III of the Constitution of the United States as to said plaintiffs; and (c) will severely limit the ability of the individual plaintiff effectively to prosecute this action;

4. That the public interest in protection of competition requires the issuance of a preliminary injunction; that the paramount national interest requires court intervention by a preliminary injunction herein; that the failure to issue such injunction will deprive the Court of full and effective jurisdiction of the said federal antitrust claims set forth in Count I of the Amended and Supplemental Complaint and will impair, obstruct, or render fruitless the Court's determination of said claims; and that a preliminary injunction as provided herein is necessary to protect the jurisdiction of this Court; and

The Court being sufficient advised in the premises, IT IS ORDERED:

1. That the liens of those certain judgments in the amounts of $170,835 and $7,345,000, plus costs of suit, entered on August 13, 1971, in the cause entitled *The Vendo Co.* v. *Harry B. Stoner and Stoner Investments, Inc.*, General No. 65-2134, in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois, and the two Bonds and the Security Agreement In Connection With Appeal Bonds, which Bonds and Agreement were dated and were

approved December 14, 1971, by the Honorable John S. Peterson, Circuit Judge, and which were entered into in connection with said judgments, remain in full force and effect. A copy of said Security Agreement is attached hereto and marked Exhibit A, and the parties thereto shall abide by the terms thereof, except that where said Security Agreement requires or permits application to the Court, such application shall hereafter be made to this Court. In order to preserve said assets subject to said judgment liens while this injunction is in force, HARRY B. STONER and STONER INVESTMENTS, INC. shall pay all taxes on, and bills for utilities and maintenance of said assets, including insurance presently covering said assets, from currently collected income.

2. That the enforcement of those certain supplementary Proceedings to Discover Assets Citations which defendant, THE VENDO COMPANY, has caused to be issued in connection with said state court judgments, namely:

Respondent	Date Issued
Chicago Title & Trust Co.	December 20, 1974
Stoner Investment, Inc.	January 3, 1975
Valley National Bank	January 3, 1975
Dreyer, Foote & Streit Assoc.	January 21, 1975
Harry B. Stoner	January , 1975
Clifford Zabka	January 21, 1975

be and they are hereby stayed, provided, however, that VENDO may apply to the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois, from time to time, for periodic extensions of said Citations, in order to prevent the automatic termination thereof, as provided by Illinois Supreme Court Rule 277(f), and plaintiffs may not object to such applications. All assets of STONER and STONER INVESTMENTS, INC. attached as the result of said Citations are released to the extent that STONER and STONER INVESTMENTS, INC. may collect all rent, interest, dividends, salaries, bank deposits, or other amounts due and owing

to them from the entities and persons named in said Citations.

3. Nothing in said Security Agreement shall preclude STONER INVESTMENTS, INC., in the ordinary course of business, from:

(a) collecting rents, interest, dividends and other income deriving from its assets for use as funds for payment of taxes, maintenance, insurance, and utilities so as to conserve and protect its assets;

(b) opening, maintaining, and using checking and savings accounts in any federally or state chartered bank in Illinois (STONER INVESTMENTS shall give notice to defendant of the establishment of any new account).

(c) paying all trade and other creditors' obligations incurred in the ordinary course of business;

(d) paying to its employees, excepting HARRY B. STONER, their ordinary salaries and wages;

(e) agreeing with any bank to completely cancel or subordinate any accounts receivable, notes or obligations which were in existence prior to January 14, 1975, including interest thereon, owing to STONER INVESTMENTS, INC. by LEKTRO-VEND CORP., to any loans to LEKTRO-VEND CORP. by such bank or other lender.

4. Plaintiffs shall be authorized to pay their reasonable attorneys fees for services and expenses in this case, but plaintiffs may not make payments therefor prior to the rendering of such services or the incurring of such expenses, and this Court's approval shall be required before any such fees or expenses are paid.

5. This order shall not be construed to prevent defendant or its agents or attorneys from participating in any pending contempt proceedings in Kane County, Illinois Circuit Court, provided that such participation is required by that Court and that the Kane County Court determines to proceed *sua sponte* with that action.

6. Until otherwise ordered by this Court, the defendant, THE VENDO COMPANY, its agents, servants, employees and attorneys, and all persons in active concert or participation with them, are enjoined from taking any further steps to enforce or collect, or attempt to enforce or collect, or commence or prosecute any related or supplementary actions or proceedings with regard to those certain judgments in the amount of $170,835 and $7,345,500, plus costs of suit, entered on August 13, 1971, in the cause entitled *The Vendo Company* v. *Harry B. Stoner and Stoner Investments, Inc.*, General No. 65-2134, in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois.

7. Plaintiffs shall not dissipate any assets which may be subject to the above-described judgments and they shall make no expenditures or investments out of the ordinary course without Court approval.

IT IS, THEREFORE, FURTHER ORDERED that upon filing by plaintiffs of an undertaking in the sum of Twenty-Five Hundred Dollars ($2,500.00), in the form of a surety bond, or bond secured by the deposit of that sum in cash with the Clerk of this Court, for the payment of such costs and damages as may be incurred or suffered by defendant if it is found to have been wrongfully enjoined, there issue out of this Court, under the seal thereof, a Writ of Preliminary Injunction, restricting said defendant, its agents, servants, employees and attorneys and all persons in active concert or participation with them, from doing any of the facts prohibited herein, unless otherwise ordered by this Court.

ENTERED:

R. W. MCLAREN
United States District Judge

DATED: June 27, 1975

APPEAL TO THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FROM THE
CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL
CIRCUIT, KANE COUNTY, ILLINOIS

THE VENDO COMPANY, **Plaintiff-Appellee,** **vs.** **HARRY B. STONER and** **STONER INVESTMENTS, INC.,** **Defendants-Appellants.**	**No. 65. C-2134**

SECURITY AGREEMENT IN CONNECTION WITH APPEAL BONDS

AGREEMENT between HARRY B. STONER, ANN M. STONER and STONER INVESTMENTS, INC.

WHEREAS, on August 13, 1971, the Court entered judgments in this case against the defendant, HARRY B. STONER, individually, and against defendants HARRY B. STONER and STONER INVESTMENTS, INC.; and,

WHEREAS, Notice of Appeal from said judgments was filed in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois, on November 3, 1971; and,

WHEREAS, HARRY B. STONER, individually and STONER INVESTMENTS, INC. have executed appeal bonds in connection with their appeal of said judgments; and,

WHEREAS, said Defendants-Appellants are unable to provide a surety company bond or schedule real or personal property as security for said bonds, yet are of the opinion

that they have good and meritorious grounds for appeal of said judgments; and,

WHEREAS, it is to the mutual benefit of the parties that this Security Agreement be executed by the Appellants to secure the Appellee and in order to permit the prosecution of said appeal without undue burden on the Appellants and without unduly jeopardizing the rights of Appellee to collect said judgments, if they are affirmed.

NOW, THEREFORE, IT IS AGREED between HARRY B. STONER and ANN M. STONER, as shareholders, directors and officers of STONER INVESTMENTS, INC., and by STONER INVESTMENTS, INC.:

1. HARRY B. STONER and ANN M. STONER represent that they are the sole stockholders of STONER INVESTMENTS, INC., holding 245 shares and 155 shares, respectively, which shares are all of the stock issued and outstanding of an authorized issue of 1,000 shares; that HARRY B. STONER is President and ANN M. STONER is Assistant Secretary of STONER INVESTMENTS, INC. and, together, they comprise two of the three member Board of Directors.

2. HARRY B. STONER and ANN M. STONER represent they are duly authorized to execute this Agreement for and on behalf of STONER INVESTMENTS, INC.; that the balance sheet for the year ended December 31, 1968 and the balance sheet as of September 30, 1971, attached hereto as Exhibits A and B, fairly reflect the financial condition of STONER INVESTMENTS, INC. as of the dates stated. No material adverse change has since occurred.

3. HARRY B. STONER and ANN M. STONER hereby represent that STONER INVESTMENTS, INC. has made no investments in, advances to or guarantees of the obligations of any company, individual, or other entity, except those disclosed in said balance sheets.

4. HARRY B. STONER and ANN M. STONER agree that as a condition of the Court's approval of the said Appeal Bonds

signed by said STONER INVESTMENTS, INC. and HARRY B. STONER that during the term of said bonds, less otherwise permitted by order of court, upon notice to plaintiff, and for good cause shown:

(a) They will continue to act in their said capacity as officers and directors of STONER INVESTMENTS, INC.

(b) Will not transfer or sell any of said shares of stock now owned by them; and

(c) Will not permit the issuance of any additional stock of STONER INVESTMENTS, INC., or an increase in the membership of its Board of Directors.

5. STONER INVESTMENTS, INC., during the term of said bond, except as permitted by order of court, upon notice to plaintiff, and for good cause shown, will not:

(a) Sell or dispose of any of its assets below the fair value thereof.

(b) Purchase any shares of its stock.

(c) Declare or pay any dividends, except as required by good business or in order to prevent possible adverse tax consequences, if a dividend were not declared.

(d) Become a party to any merger or consolidation with any other company.

(e) Increase the aggregate compensation of its officers or directors in any fiscal year more than ten per cent (10%) above the compensation paid during the preceding fiscal year; and

(f) Make any material change in the management of STONER INVESTMENTS, INC. or conduct its business other than in a good and businesslike manner.

6. Promptly after approval of this Security Agreement and the appeal bonds to which it is related, by the Circuit

Court of Kane County or by the Appellate Court of Illinois for the Second District or by the Supreme Court of Illinois, STONER INVESTMENTS, INC. will cause the trustees of all the land trusts of which STONER INVESTMENTS, INC. is the beneficial owner, to convey all the lands held by such trusts to STONER INVESTMENTS, INC. and the lien of said judgments will attach thereto.

7. STONER INVESTMENTS, INC. will enter into an Escrow Agreement with The Chicago Title and Trust Company, satisfactory to that company, which will provide for the deposit with The Chicago Title and Trust Company of the net proceeds of the sale of real estate sold by STONER INVESTMENTS, INC., or by any land trust of which STONER INVESTMENTS, INC. is the beneficial owner, which proceeds may be invested by The Chicago Title and Trust Company and which investments shall be held by Chicago Title and Trust Company and the income thereon accrued and added to the fund. The Escrow Agreement shall also provide that a portion of the net proceeds (not to exceed, in any one year, the lesser of (a) $15,000, or, (b) the net proceeds deposited in that year), of sales of real estate so deposited are to be paid by The Chicago Title and Trust Company to STONER INVESTMENTS, INC. to reimburse STONER INVESTMENTS, INC. for real property taxes, interest, penalties and costs levied and paid on unimproved property held directly or indirectly by STONER INVESTMENTS, INC.

8. Defendants have made a disclosure of the terms of a certain lease entered into between Merchants National Bank, as Trustee under Trust No. 1824, and Stoner Shopping Center, Inc., dated May 1, 1971, by furnishing VENDO with a copy thereof, but nothing in this Security Agreement shall be construed as denying VENDO the right to claim that Defendants have a property interest in Stoner Shopping Center, Inc.

IN WITNESS WHEREOF, the parties hereto have signed this Agreement as of the 14th day of December, 1971, to become

effective upon the approval thereof by the Circuit Court of Kane County.

HARRY B. STONER
Harry B. Stoner

ANN M. STONER
Ann M. Stoner

STONER INVESTMENTS, INC.

By HARRY B. STONER,
Harry B. Stoner,
President

Attest:

ANN M. STONER
Ann M. Stoner
Asst. Secretary

Taken and approved by me this 14th day of December, 1971.

JOHN B. PETERSEN
Circuit Judge